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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1894.

No. 690.

HENRY MORGAN, GUARDIAN OF ROBERT MORGAN, A MINOR; JACOB CAMPBELL, AND M. A. ARNOTT, APPELLANTS,

vs.

J. E. POTTER, GUARDIAN OF ROBERT MORGAN, AND SARAH LEE WILLIAMS, AS NEXT FRIEND OF SAID ROBERT MORGAN, A MINOR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 13, 1894.

(15,572.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1894.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 350, December Term, 1893.

HENRY MORGAN, Guardian of Robert Morgan, a Minor; Jacob Campbell, and M. A. Arnott, Appellants, *vs.* J. E. POTTER, Guardian of Robert Morgan, and Sarah Lee Williams, as Next Friend of said Robert Morgan, a Minor, Appellees.	Appeal from the Circuit Court of the United States for the District of Kansas.

By the record in the above-entitled cause, which comes to this court on appeal from a decree in favor of the complainants below, which was entered by the United States circuit court for the district of Kansas, it appears that said complainants filed a bill in said United States circuit court for the district of Kansas in words and figures as follows, to wit:

"To the judges of the circuit court of the United States for the district of Kansas, sitting in equity:

J. E. Potter, guardian of Robert Morgan, a resident and citizen of the State of Kentucky and county of Warren, and Sarah Lee Williams, as next friend of said Robert, a resident and citizen of the same county and State, bring this their bill against Henry Morgan, guardian of said Robert, and Jacob Campbell and M. A. Arnott, all of whom are residents and citizens of the county of Ottawa and State of Kansas.

And thereupon your orator and oratrix, jointly suing and as joint complainants, complain and say that on the 16th day of March, 1883, Joseph Morgan, the father of Robert Morgan, died in the State of Texas intestate, leaving surviving him your oratrix, who was his duly wedded and lawful wife, and two infant sons—John, who has since died, and the said Robert Morgan; that both of said infants were also the children and offspring of your oratrix, and said Joseph left no other heirs. Your complainants say further that at the time of the death of said Joseph Morgan he owned no property except a large herd of cattle in the said State of Texas,

2 and immediately after his death your oratrix moved, with her two infant sons, to the State of Kansas, in which State she continued to reside till the —— day of October, 1886, when she moved therefrom to the State of Kentucky and county of Warren, with her said infant son, Robert Morgan, and has continuously resided in said last-named State and county with her said son Robert from said last-named date till this time.

She says that, acting under the advice of Henry Morgan, one of the defendants, and under his direction, she consented that said herd of cattle might be sold, and it was sold at its full value to H. W. Creswell, of the town of Lipscombe and State of Texas, she consent-

ing thereto under the advice of said Morgan in order to save the expense and trouble incident to administration, she being at the time a resident of the State of Kansas.

Your complainants say further that your oratrix received as part of the purchase price of said cattle a promissory note, duly made and executed to her by H. W. Creswell, for the sum of twenty-five thousand dollars ($25,000), which bore interest from November 1, 1883, till paid, and the same was due and payable August 10, 1885, and they say further that, acting under the persuasion and advice of the defendant Henry Morgan, your oratrix assigned and transferred to him said last-named note, to be collected by him when due, she relying at the time upon the promise and agreement by said defendant that he would profitably invest and use said sum of money for the use and benefit of said infant, Robert Morgan, the same being then estimated as the interest of said infant in the estate of his said father.

Complainants say further that at the time she delivered said note to defendant to be held in trust by him for said Robert she suggested to him to have a guardian appointed for said infant, but he refused to do so, saying it was not necessary; that he gave her no receipt till April 13, 1887, for same; that he executed no bond for the faithful discharge of his trust and made no attempt to have himself appointed guardian till after the second marriage of your oratrix, which marriage was consummated February 2, 1887, at which time your oratrix was duly married to J. T. Williams, a resident of the county of Warren and State of Kentucky, whose wife she now is.

Complainants say further that after the marriage of your oratrix to said Williams the defendant Morgan attempted to procure
3 her consent for him to act as such guardian, which she refused to give because she doubted his moral integrity and business capacity; but, notwithstanding her refusal to give her consent, they say that said Morgan thereafter did, on the 14 day of February, 1887, file in the office of the probate judge of Ottawa county his petition to be made guardian of said Robert, in which he falsely and fraudulently stated 'that the residence of Sarah L. Morgan and said minor is Minneapolis, Ottawa county, Kansas,' he well knowing at the time that there was no such person in law as Sarah L. Morgan, and well knowing at the time that neither your oratrix nor her said son had at any time resided in Ottawa county within twelve months prior to that time; and further stated falsely and fraudulently in said petition that your oratrix desired him to act as guardian of said minor; and further stated therein falsely and fraudulently that the personal and real property belonging to said minor, in his possession and under his control, was of the value of about $25,000, he then well knowing it was of the greater value than $30,000, to wit, $—.

Your complainants say further that the judge of said probate court, relying upon said statements and being deceived thereby, did wrongfully and illegally appoint said Henry Morgan guardian of the estate of said infant, Robert Morgan, and he thereupon executed

an approved bond as such guardians, with defendants Jacob Campbell and M. A. Arnott sureties, and took the oath required in such cases, and is now, by virtue of said appointment, acting as such guardian; that said bond is in words and figures as follows:

Know all men by these presents that we, Henry Morgan, as principal, and Jacob Campbell and M. A. Arnott, as sureties, are held and firmly bound unto the State of Kansas in the sum of fifty thousand ($50,000) dollars; to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents. Sealed with our seals and dated this 14th day of February, A. D. 1887. The condition of the above obligation is such that whereas the said Henry Morgan has been by probate court of Ottawa county, Kansas, duly appointed guardian of the estate of Robert Morgan: Now, if said Henry Morgan shall faithfully discharge the duties of such guardian according to law, then this obligation to be null and void; else of full force and effect.

(Sg.) HENRY MORGAN. [SEAL.]
4 (Sg.) JACOB CAMPBELL. [SEAL.]
(Sg.) M. A. ARNOTT. [SEAL.]

The above bond taken and approved by me this 14 day of February, A. D. 1887.

(Sg.) WILLIAM D. THOMPSON,
Probate Judge.

STATE OF KANSAS, }
Ottawa County. }

I, Henry Morgan, do solemnly swear that I will faithfully and to the best of my ability discharge the duties of guardian of the estate of Robert Morgan, minor, according to law, so help me God.

(Sg.) HENRY MORGAN. [SEAL.]

Subscribed in my presence and sworn to before me this 14 day of February, A. D. 1887.

(Sg.) WILLIAM D. THOMPSON,
Probate Judge.

Complainants say further that defendant Morgan has broken the covenants of said bond and failed to discharge his duty as guardian aforesaid in the following ways and acts, to wit:

1. Said Morgan failed to file a true or a just inventory of the estate of his said ward, as required by the laws of Kansas, but, instead thereof, he filed a pretended inventory which was both false and fraudulent, a copy of which is filed as part hereof, marked 'H. M. No. 2.' They say it is not true that said infant was the owner of 70 head of cattle, or 1 thoroughbred cow, or of any heifer, or of any mules, or wagon, or harness, or harrow, or plow, or stalk-cutter, or cultivator, or mower, or rake, or hogs, or corn, and they say it is not true that such articles or property were worth the sum of $3,241.00; but they say that said Morgan purchased all of same for his own use and benefit, and in order to cheat and defraud his said

ward he attempted in said inventory to transfer said property to his ward at a greater sum than its actual value and at a greater sum than its cost to him, and withheld from him and excluded from his inventory interest-bearing mortgages executed for the money placed in his hands as aforesaid by your oratrix to be invested and used for his said ward, and withheld in like manner valuable real estate purchased by said Morgan with the trust funds aforesaid and the title to which he illegally took in his own name.

2. Complainants say further that said inventory is false and fraudulent in this, that the 320 acres named therein was purchased by said Morgan with the trust funds aforesaid on the — day of ——, 18—, at the sum of $6,100, and was never worth at any time the sum of $35 per acre. If it was worth said sum the said infant could only be charged in the inventory with its cost in accounting for his estate. Complainants say further that the 320 acres of land named in said inventory had been used by said Morgan for his own use and benefit; that he had received the proceeds of same and the crops from same and failed to account for same in any way in his inventory.

3. Complainants say further that he failed in said inventory to account for more than $5,000, to wit, $— and interest upon same, being a part of the original trust funds placed in his hands as aforesaid by your oratrix. The exact amounts of same are unknown to complainants and cannot be stated, but they call upon defendant Morgan to state the disposition he has made of all said funds and how he has invested them.

4. Complainants say that in his said inventory he fails to account for $1,140.00 profit on a tract of land sold by him to Waite Pearsoll, Jan'y 5, 1887, and for $70 realized on the sale of lot 2, block 5, in addition to Minneapolis, sale being made November 29, 1886, and for $1,360 profit realized on sale to Sarah L. Morgan of section 23, township 11, range 5, February 4, 1885, and for $175 profits on a sale of real estate made to Sarah L. Morgan March 5, 1884, and for various other profits realized from sales of property purchased with said ward's funds unknown to these complainants. Complainants say that they believe and charge that all the lands aforesaid were purchased with the funds placed in the hands of said Henry Morgan by your oratrix to be invested, as before alleged, for said Robert, and said Morgan is called upon to answer specifically from whom and how he got the funds with which all the lands aforesaid were purchased.

5. Complainants say further that on the 25 day of February, 1888, the defendant Morgan filed before the probate judge aforesaid a paper purporting to be an annual settlement of his said ward's estate, but they say that in said account he fails to account for the interest upon said ward's money to the amount of $—, the exact amount of which is unknown to complainants, and that he therein charges him with loss on personalty illegally charged to him in his original inventory to the amount of $— as aforesaid and illegally fails to account for the reasonable annual

rental value of his said ward's estate, to wit, $—, and say further that he illegally charges therein for his personal services $600.00, when his services were not worth one dollar or any other sum to the said ward or his estate, but, on the contrary, he had acted for himself and his own interest and to the injury of his said ward. He files as part hereof a copy of said paper, marked 'H. M. No. 3,' and they also file as part hereof a copy of the petition filed before said probate judge as part hereof, marked 'H. M. No. 4,' and they also file as part hereof the receipt of said Morgan to Mrs. J. T. Williams, of date April 13, 1887, as part hereof, marked 'H. M. No. 5.'

6. Complainants say further that on the — day of —— your orator, J. E. Potter, was duly appointed guardian of said Robert Morgan by an order of the county judge of Warren county and State of Kentucky; that said order was made on the joint petition of your oratrix and her husband, J. T. Williams, filed before said judge, and he thereupon executed bond as such guardian, with P. J. Potter, H. P. Potter, and W. J. Potter as his sureties, as required in such cases, which bond was duly approved and accepted by the court, and thereupon your orator took the oath prescribed in such cases and had letters of guardianship issued to him by order of said court, all of which was duly and regularly done by said court, which said court had full jurisdiction of both the person and estate of said infant at the time all the proceedings aforesaid were had; and that by virtue of this appointment and the proceedings aforesaid your orator is the duly qualified and acting guardian of said Robert Morgan.

Complainants say further that Robert Morgan has no estate save that in the hands of defendant Morgan; that your orator has nothing upon which to educate or rear the said infant, and that to permit two guardians to act for his estate would be injurious and hurtful to the interests of said ward. They say that defendant Morgan is abusing his trust and is cheating and defrauding his said ward; that his appointment was procured by him fraudulently, as set forth herein, and without notice to your oratrix; that the ward is a non-resident of your State; that the feelings existing between defendant Morgan and your oratrix are unkind, owing to the wrongs of said Morgan, and for these and other reasons it is greatly to the
7 interest of said ward that defendant Morgan be required to settle his accounts as guardian with this honorable court and be required to turn over to your orator all the estate of said Robert that it may be moved to the State in which said ward resides. Complainants say that as guardian aforesaid your orator has demanded of Henry Morgan, as guardian of said infant, the estate in his hands, which said Morgan refuses to surrender. A transcript of all the proceedings of the Warren county court in the appointment of your orator as aforesaid *are* filed as part hereof, and also his letters of guardianship.

To the end, therefore, that the said Henry Morgan, as guardian aforesaid, may, if he can, show why your orator and oratrix should not have the relief hereby prayed and may, upon his corporal oath and according to the best and utmost of his knowledge, remem-

brance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written he is respectfully required to answer—that is to say: (Here follow numerous interrogatories.)

Complainants therefore pray that the order appointing said Morgan guardian be set aside and annulled; that complainants recover of him for the use of Robert Morgan the 320 acres of land conveyed to said Robert, and he be required to surrender possession of same; that he be required to account for a reasonable rental value of said land; that he be required to account before the master of this court for all the profits and interests received from the money held by him for Robert Morgan; that they recover of him any real estate purchased with said trust funds which it is to the interest of said ward to claim and to hold, and that they recover judgment against defendants Morgan, Campbell, and Arnott for any sum due said Robert Morgan, and be permitted to remove all his property to the State of Kentucky, and that they recover of defendants their costs, and further pray that they may have generally such other and further relief as the nature of their case shall require and to this honorable court shall seem meet.

And may it please your honors to grant unto them the writ of subpœna issuing out of and under the seal of this court, to be directed to said defendants, Henry Morgan, guardian of Robert Morgan; Joseph Campbell, and M. A. Arnott, commanding them and each of them by a certain day and under a certain penalty
8 therein inserted to appear before your honors in the circuit court of the United States for the district of Kansas, at Topeka, and then and there answer the premises and abide the order and decree of this court."

To the foregoing complaint the following demurrer was filed, which was subsequently overruled:

"The joint and several demurrer of Henry Morgan, guardian of Robert Morgan; Jacob Campbell, and M. A. Arnott, defendants, to the bill of complaint of J. E. Potter, guardian of Robert Morgan, and Sarah Lee Williams, as next friend of said Robert Morgan, the above-named complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainants' bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demur to said bill, and for causes of demurrer show—

That said complainants or either of them have not in and by their said bill made or stated such a case as entitles them or either of them in a court of equity to any discovery from these defendants or either of them or to any relief against them or either of them as to the matters contained in said bill or any of such matters.

That it appears by said bill that this court has no jurisdiction of the matters and things contained in said bill or any of such mat-

ters; that it appears by said bill that the probate court within and for the county of Ottawa, in the State of Kansas, has sole and exclusive jurisdiction to grant relief concerning the matters and things contained in said bill in case said complainants or either of them is entitled to any relief by reason thereof.

That it appears by said bill that said complainants have a full, complete, and adequate remedy at law of and concerning all the matters and things in said bill contained.

Wherefore, and for diverse other good causes of demurrer appearing in the said bill, these defendants demur thereto and humbly demand judgment of this court whether they or either of them shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained."

The following answer and replication were subsequently filed:

"The joint and several answers of Henry Morgan, guardian of Robert Morgan, and Jacob Campbell and M. A. Arnott, de-
9 fendants, to the bill of complaint of J. E. Potter, guardian of said Robert, and Sarah Lee Williams, as next friend of said Robert Morgan, plaintiffs.

These defendants respectfully, now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say—

That they admit that said Joseph Morgan, the father of the said Robert Morgan, died intestate in the State of Texas on the 16th day of March, 1883, leaving surviving him the said oratrix, who was his lawful wife, and the two sons described in said bill, and that the said Robert is the child and offspring of said oratrix and said Joseph, and that said oratrix and said Robert, since the death of said John, are the only heirs of said Joseph Morgan, deceased.

These defendants admit that the only property owned by said Joseph at the time of his death was the herd of cattle mentioned in said bill and a number of ponies and the equipments used with them for the herding of cattle.

These defendants admit that said oratrix, with her said sons, moved to the State of Kansas immediately upon the death of her said husband, but upon their information and belief these defendants deny that she removed therefrom in the month of October, 1886, to the county of Warren, State of Kentucky, with said Robert, and that she has continuously resided in said last-named State with said Robert since said month of October.

These defendants further say that said Joseph Morgan was the brother of said defendant Henry Morgan, and at the time of his death as aforesaid said Henry Morgan was living in McPherson, McPherson county, Kansas, and was engaged in a lucrative busi-

ness at that place, and that on or about the 15th day of April, 1883, said oratrix requested defendant Henry Morgan to meet her at Dodge City, Kansas, and, in compliance with said request, he immediately went to that place, when said oratrix requested him to go to the State of Texas and to take charge of the said herd of cattle and ponies, and that, in compliance therewith, he abandoned said business and made two trips to the said State of Texas and spent at least two months in gathering up and selling said cattle, and
10 the said sale of said cattle was made, as set forth in said bill, with the knowledge of said oratrix and with her consent and by her request, to said H. W. Creswell for the sum of $90,000.00, and promissory notes were given for said amount by the said H. W. Creswell to said oratrix, and that at the time said notes were so made and executed said oratrix determined that at least $25,000.00 thereof would belong to said Robert, and one of said notes was made for that amount and was indorsed and transferred by said oratrix to said defendant under a request then made by her that said defendant should keep and take care of said note for said Robert.

These defendants deny that said oratrix acted under the direction of said defendant Henry Morgan in consenting that said herd of cattle might be sold as aforesaid, but they admit that he advised her to sell said cattle, for the reason that it was all they were worth and the said sale would save the trouble and expense incident to an administration in the State of Texas.

These defendants admit that said oratrix received the note for $25,000.00 described in said bill, but they deny that defendant Henry Morgan persuaded or advised her to assign to him the said note to hold in trust for said Robert.

These defendants further deny that at the time said note was delivered to defendant Henry Morgan as aforesaid that the said oratrix suggested to him to have a guardian appointed for said Robert, and that he refused to do so, saying that it was unnecessary, but avers the fact to be that he frequently suggested to her prior to October, 1886, that it would be proper that such guardian should be appointed, and she at such times opposed the appointment and assigned as her reasons therefor that she contemplated moving to the State of Illinois, and that if a guardian was appointed in Kansas it might in some way interfere with such removal.

These defendants admit that defendant Henry Morgan gave said oratrix no receipt for said money until April, 1887, and allege that she never in any way asked for or intimated that a receipt was desired prior to that date. Defendants further admit that prior to the filing by Henry Morgan, defendant, of his petition with the probate court of Ottawa county, Kansas, for his appointment as guardian of said Robert he gave no bond concerning his trust or made any attempt to have himself appointed such guardian, except that he frequently suggested the appointment of a guardian to said oratrix as aforesaid.

11 These defendants deny that after the marriage of said

oratrix to said Williams she refused to give her consent that he should act as guardian for said Robert.

These defendants admit that defendant Henry Morgan was duly appointed guardian of said Robert by said probate court on the 14th day of February, 1887, and that such appointment was made upon a petition filed by him with said court, a copy of which is set forth in said bill.

And these defendants say that on the 14th day of February, 1887, the defendant Henry Morgan filed with the probate court his petition for his appointment as guardian of said Robert Morgan, a copy of which petition is attached to said bill and made a part thereof, and that on said day said probate court appointed said defendant Henry Morgan guardian of said Robert and issued to him letters of guardianship, a copy of which is attached to said bill and made a part thereof, and that on said day said defendant Henry Morgan executed his bond as such guardian, which was duly approved by said probate court, and he thereupon entered upon the duties of his trust and has since been and now is such guardian.

And these defendants deny that there are any false and fraudulent statements set forth or contained in said petition, but say that the statements therein set forth defendant Henry Morgan at the time believed to be true and still believes them to be true, with the exception of the name of said oratrix, and that at the time of the filing of said petition he had no knowledge that she had intermarried with the said Williams.

These defendants further deny that the judge of said probate court was deceived by said petition or wrongfully or illegally appointed said defendant Henry Morgan as guardian of said Robert. These defendants admit that a bond, a copy of which is set forth in said bill, was executed and filed with and approved by said probate court, but they deny that defendant Henry Morgan has broken the covenants of said bond or has failed to discharge his duties as such guardian.

These defendants further say that during the month of October, 1886, the said oratrix went from her home in Ottawa county, Kansas, to Bowling Green, county of Warren, in the State of Kentucky, for the sole and only purpose of attending school for a number of terms at that place and of returning to her home in the said county of Ottawa at the expiration of that time.

12 And these defendants further say that at the time she left the said county of Ottawa to attend school as aforesaid she then had and for several months thereafter employed and empowered defendant Henry Morgan to purchase for her a house and lot in the city of Topeka, Kansas, and during all the time from said month of October, 1886, until after defendant Henry Morgan was appointed guardian as aforesaid she owned a residence property in the city of Minneapolis, in said county of Ottawa, which was used by her as a residence and was furnished for her use as such residence upon her return to said city at the expiration of said term of school; and these defendants upon their information and belief further say that said oratrix did not prior to the appointment of

said Henry Morgan guardian as aforesaid change her said intention of returning to said city of Minneapolis at the close of the said terms of school, and that at the time said Henry Morgan was appointed guardian as aforesaid said oratrix and said Robert were residents of said Ottawa county.

These defendants further say that during the month of March, 1887, said oratrix and her said husband, J. F. Williams, visited at the house of defendant Henry Morgan, in said city of Minneapolis, for several days, and that during such visit he informed said oratrix that he had been appointed guardian of said Robert by said probate court, and that he had given his bond, telling her who the bondsmen were, and she made no objection to such appointment, but expressly told him that it was all right, and that she was glad he had been so appointed, and that during said visit said oratrix in no way dissented or objected to said defendant Henry Morgan acting as guardian of said Robert or in any way or manner demanded the property in his hands or under his control as such guardian.

These defendants further say that said oratrix and her said husband were again at the house of defendant Morgan, in the said city of Minneapolis, for several days during the month of April, 1887, and at that time said Williams, the husband of said oratrix, asked defendant Morgan for a receipt showing that he had received the proceeds of said note for $25,000.00, and thereupon said oratrix said that it was not necessary to give such a receipt, but defendant Morgan did then execute the receipt set forth in said bill and acknowledged the same before a notary public, but said oratrix did not in any way demand said property or indicate by word or action that she did not desire defendant Morgan to act as such guardian.

13 These defendants further say that said note for $25,000.00 was made payable in Pueblo, Colorado, and that at the time it became due the maker thereof notified said oratrix that he desired to pay the same, and at her request defendant Morgan went to Pueblo and collected the money due thereon, which amounted to $27,412.50, and that he received the said sum on the 12th day of August, 1885. These defendants further say that the 320 acres of land mentioned in said bill was, during the fall of 1885, purchased by said defendant Morgan for the said Robert at the request of said oratrix made to him, and that prior to such purchase said oratrix had examined said real estate, and that he paid for the same the sum of $6,100, and that such payment was made out of the proceeds received by him from said note, and that such purchase was made at a public sale upon a mortgage-foreclosure proceedings and the value of the land so purchased was equal to the amount paid therefor.

These defendants say that during the time from the purchase of the said real estate to the — day of October, 1886, defendant Morgan, at the special request of the said oratrix to him made, constructed and built the following improvements on the said real estate, to wit: Five and one-fourth miles of fence, a good dwelling-house, 16 x 24 feet, story and a half high, with a "lean-to;" a good barn, 16 x 32, story and a half high, well made; a good frame corn

crib, with a good foundation thereunder, 28 x 30 feet, with a driveway between the cribs; a good tool-house and wagon shed, a well with a pump therein, a shed for cattle, 130 x 25 feet, made out of good lumber and well built; also a bridge and two fords across the creek which runs through the premises, and that while they were being made she very frequently visited the premises and had full knowledge of the character of said improvements and the manner in which they were being made.

These defendants further say that during the fall of 1885 defendant Morgan purchased, at the request of said oratrix, to him made, 73 head of steers and one cow and a calf to be put and kept on said real estate, and that he paid for the same the sum of $2,330, which was the market value at that time, and also purchased, at a like request, a span of mules, harness, and wagon, to be used upon said real estate, and paid therefor the sum of $400, which was the value thereof at that date.

That two of the said steers died and this defendant sold one of them, and the balance, with said cow and heifer and said mules, harness, and wagon, are mentioned and contained in said inventory.

14 These defendants further say that during the fall of 1885 defendant Morgan purchased of a party who then had *upon* the said place a quantity of corn and about 70 hogs and paid therefor the sum of $590.00, which was the market value of the same, and that such purchase of corn and hogs was made at the request of said oratrix.

These defendants further say that said mules, cattle, and hogs were kept and fed upon the said real estate during the winter of 1885–'6, and that most of the said hogs died with the cholera during said winter, and for those which remained in the spring defendant Morgan received the sum of $100, which was a fair price therefor, and that during the said winter the said corn, with other feed purchased by defendant Morgan, was fed to said stock.

These defendants further say that during the time from the purchase of the said real estate until October, 1886, this defendant Morgan paid out for the materials for said improvements upon said real estate hereinbefore described, the labor for making the same, and for the care of said stock and for help, feed, and seed to work said land the sum of $3,814.00.

These defendants further say that defendant Morgan paid the taxes on said real estate for the years 1885 and 1886, amounting to $159.00. He also paid during the fall of 1885 $50.00 attorney's fees for examination of the title to said land. He also paid for agricultural implements to work said land the sum of $156.00.

These defendants further say that to the time of his appointment as guardian defendant had loaned for said ward and received promissory notes evidencing such loans which were good and well secured, and that the money so loaned amounted to $13,772.00, which said notes are described in said inventory.

That at the time the said defendant Morgan was looking after the said herd of cattle as aforesaid said oratrix promised that he should be well paid for his services and should be repaid any sums of

money that he paid out while so engaged, and that afterwards and while he was performing his said trust in purchasing said real estate and stock and looking after the same and loaning said money said oratrix also agreed with him that he should receive a reasonable compensation for his services.

These defendants further say that the services rendered by defendant Morgan for said ward, including the part that should be paid out of said ward's estate for looking after said herd of cattle, are of the value of $1,500.00.

15 Defendants further say that prior to the appointment of defendant Morgan as guardian as aforesaid he had collected on the promissory notes referred to above, as interest, the sum of $1,241.00, and that at the time he was appointed guardian as aforesaid, and after deducting from the cash in his hands said $1,500.00 due him for services as aforesaid, he had in his hands the sum of $73.27, which is marked on said inventory.

These defendants further say that during the year 1885 defendant Morgan planted 100 acres of corn on said real estate and properly tended and cared for the same, but receiving nothing therefrom, as such crop was a failure, in common with the corn crop of that vicinity during that year, and that also, during the year 1887, he again planted 100 acres of corn on said real estate, which was well and carefully tended, but failed to produce any crop, for the reason that it was destroyed by the drouth.

These defendants further say that in September, 1887, defendant Morgan rented said real estate by written lease to one Frank Binkley for the term of five (5) years, under which lease he is to receive as rent for the land one-third of the crops raised thereon and $125 in cash each year.

That for these cash payments he took five promissory notes for $125 each, one of which is payable at the end of each year. All of said notes are well secured by chattel mortgage. One of said notes was paid during the month of Sept., 1888.

During the year 1888 the crops failed upon said real estate by reason of excessive drouth, and nothing was raised thereon to turn over to defendant Morgan except some wheat, his share of which was worth and sold for $80.00.

These defendants further say that said cattle were sold for less than they were appraised at in said inventory for the reason that cattle were so much lower at the time they were so sold than at the time they were so appraised.

Defendants further say that the only benefit or use defendant Morgan has had of said premises for himself was the pasturing thereon during the summer of 1887 three colts, that he then owned.

Defendants further say that at the request of said oratrix defendant Morgan has kept on said premises four of the ponies which belonged to his said brother's estate.

These defendants further say that for an ordinary year said real estate should rent for at least between $700.00 and $800.00.

16 These defendants deny that defendant Morgan has failed to file a true and just inventory of the estate of his said ward, and allege that the steers therein described were what remained of said 73 head of steers, and that said cow, heifer, and span of mules, wagon, and harness are the same hereinbefore described, and the said agricultural implements were bought for the purpose of carrying on and working the said real estate as aforesaid, and that said hogs were raised thereon, and these defendants deny that defendant Morgan purchased said property for his own use and benefit.

These defendants also allege that said personal property described in said inventory was of the value of $3,241.00, and these defendants further deny that said property was purchased for defendant Morgan's benefit or use or that he transferred the same to his said ward at a greater sum than it cost him for the purpose of cheating or defrauding him.

These defendants further deny that defendant Morgan withheld from said inventory any of the interest-bearing mortgages executed for said ward's money, or that he withheld any of the real estate purchased by him for said ward with the money received from said note, and these defendants admit that said 320 acres of land was not worth $35 per acre at the time of its purchase as aforesaid, but allege that it was, with the improvements thereon, worth that sum per acre at the time defendant Morgan was appointed guardian as aforesaid.

These defendants deny that defendant Morgan has used said 320 acres of land or received any benefit therefrom excepting the pasturing of three colts as aforesaid, and they further deny that he has failed in said inventory to account for more than $5,000.00, or any other sum, or any interest thereon, and they deny that he failed to account in said inventory for any sum or sums of money belonging to said ward, and allege that he did not make $1,146.00 profit on a tract of land sold by him to Wait Pearsall Jan'y 5th, 1887, and that he did not purchase or sell lot two (2), in block five (5), in addition to the city of Minneapolis, or make $70 thereon, or any other sum, but defendants admit that he sold to Sarah Lee Morgan section twenty-three (23), in township eleven (11), range five (5) west, in Ottawa county, Kansas, and that he made on such sale about $350.00. They also admit that he made about $175 on a sale of real estate made to Sarah Lee Morgan about March, 1884, and that soon afterwards he sold said real estate for Sarah Lee Morgan at a profit of about $600.00 for her; and these defendants further

17 allege that none of his ward's money was used by defendant Morgan in the purchase of the pieces of real estate last above referred to or any other real estate excepting the 320 acres of land and the southwest quarter of section two (2), in township twelve (12), range four (4) west, in Ottawa county, Kansas, which he purchased by the order of said probate court during about the month of May, 1888.

These defendants deny that in the annual settlement of said ward's estate, made on the 25th day of February, 1888, defendant Morgan failed to account for the interest upon said ward's money,

or any part thereof, and they allege that the losses charged upon personalty and the amounts charged for moneys paid for labor, for personal property, and for taxes in said settlement are correct and just and should be allowed defendant Morgan; and they further deny that in said settlement defendant Morgan failed to account for any of the rents or profits upon said ward's estate, or that he illegally charged therein for his services the sum of $600, and they allege that said services were of the value of $600.

These defendants further deny that the said probate court of Warren county, Kentucky, had jurisdiction of the estate of said Robert at the time the proceedings by said court mentioned in said bill were had.

These defendants admit that said J. E. Potter has no estate in his hands belonging to said Robert, and they allege that said oratrix, the mother of said Robert, at the time she married said Williams was the owner of real and personal property of the value of $65,000.00.

These defendants deny that defendant Morgan has abused his trust and is cheating or defrauding his said ward, or that his appointment as such guardian was procured fraudulently.

And they further deny that the feeling- existing between him and said oratrix are unkind, and allege that the kindest feelings and strong- ties of friendship existed between said oratrix and defendant Morgan up to the time of her marriage with the said Williams, with whom she had no acquaintance until she became his pupil on the 16th day of November, 1886, that being the date that she commenced attending school at said Bowling Green, as aforesaid.

These defendants further say that defendant Morgan had no knowledge that said oratrix entertained any unkind feelings towards him or was dissatisfied with the manner in which he exercised his trust as guardian until said bill was filed in this action.

These defendants deny that said J. E. Potter has ever made a demand upon defendant Morgan for the property in his pos-
18 session and under his control as guardian of said Robert.

These defendants deny that it is greatly to the interest of said ward that defendant Morgan be required to settle his account as guardian with this honorable court and be required to turn over to said orator all the estate of said Robert, that it may be removed to said State of Kentucky.

The defendant Henry Morgan, for his answer to certain of the numbered interrogatories in said bill, says (here follow answers).

And these defendants submit to this honorable court that all and every of the matters in said plaintiff's bill mentioned and complained of are matters which may be tried and determined in the probate court of Ottawa county, Kansas, and with respect to which the said plaintiffs are not entitled to any relief from a court of equity, and these defendants hope that they shall have the same benefit of this defense as they are entitled to under a demurrer to the plaintiff's bill; and these defendants deny all and all manner of unlawful combination and confederacy and false and fraudulent

actions and statements wherewith defendant Henry Morgan is, by the bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained."

The foregoing answer was duly verified by the defendant Henry Morgan.

Replication.

"These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed."

19 Section 155, article 3, of the constitution of the State of Kansas contains the following provision: "There shall be a probate court in each county which shall be a court of record and have probate jurisdiction and care of estates of deceased persons, minors and persons of unsound mind as may be prescribed by law. * * * This court shall consist of one judge who shall be elected by the qualified voters of the county and hold his office two years. He shall be his own clerk and shall hold court at such times and receive for compensation such fees as may be prescribed by law."

The general statutes of the State of Kansas for 1889, which are in force at the present time and were in force when this action was instituted, contain the following provisions, to wit:

SEC. 2116. "The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction. * * * Fourth. To appoint and remove guardians for minors, persons of unsound mind and habitual drunkards, and make all necessary orders relating to their estates, to direct and control their official acts and to settle their accounts."

SEC. 3223. "Guardians appointed to take charge of the property of the minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate, of the minor, conditioned for

the faithful discharge of their duties as such guardian, according to law. They must, also, take an oath of the same tenor as the condition of the bond."

SEC. 3224. "Within thirty days after their appointment they must make out an inventory of all the property of the minor which shall be appraised in the same manner as the property of a deceased person. The inventory must be filed in the office of the probate court."

SEC. 3226. "Guardians of the property of minors must prosecute and defend for their wards. They must, also, in other respects, manage their interests under the direction of the court; they may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards."

SEC. 3235. "A failure to comply with any order of the court in relation to the guardianship shall be deemed a breach of the condition of the guardian's bond which may accordingly be put in suit by any one aggrieved thereby, for which purpose the court may appoint another guardian of the minor if necessary. The court may also commit him to jail until he complies with such order."

SEC. 3236. "Guardians of the property of minors must account, on oath, annually, or oftener, if required by the court. It may, also, direct them to give new or additional security, or may remove them for good cause shown, which cause must be entered on the records."

SEC. 3241. "Guardians shall receive such compensation as the court may from time to time allow. The amount allowed, and the service for which the allowance was made, must be entered upon the records of the court."

SEC. 3242. "An appeal may be taken to the district court from any order or decision of the probate court in any matter arising under this act upon the same terms and conditions as are appeals under the provisions of the act respecting executors and administrators and the settlement of the estate of deceased persons, except, that no ward under the age of majority shall be required to give any bond on taking such appeal."

SEC. 3248. "When a minor for whom a guardian has been appointed in this State shall remove to another State or Territory, and a guardian of such infant shall be there appointed, the guardian appointed in this State may be discharged and required to settle his account as hereinafter provided."

SEC. 3249. "Such discharge shall not be made unless the guardian appointed in another State or Territory shall apply to the probate court in this State, which made the former appointment, and file therein an exemplification of the record of the court making the foreign appointment, containing all the entries and proceedings in relation to his appointment, and his giving of bond, with a copy thereof and of the letters of guardianship, all authenticated as required by the act of Congress in that behalf; and before such application shall be heard, or any action taken therein by the court, at

least thirty days' written notice shall be served on the guardian appointed in this State, specifying the object of the application, and the time when the same will be heard. Provided further,
21 that the court may in any case deny the application unless satisfied that the discharge of the guardian appointed in this State would be to the interest of the ward."

When the foregoing bill of complaint was filed in the circuit court of the United States for the district of Kansas the estate of said Robert Morgan, minor, was and now is undergoing administration in the probate court for the county of Ottawa, State of Kansas. The guardian appointed by said probate court had filed an inventory therein, pursuant to the laws of Kansas, which he claimed to be a true account of all the property of said ward in his custody. He had also filed therein each year, pursuant to the laws of Kansas, an annual report or account, which he claimed to be a true and correct account of the condition of said ward's estate in his hands. The inventory and annual settlements aforesaid had not been excepted to in said probate court nor the correctness thereof otherwise challenged by the minor or by any one acting in his behalf. So far as appears, the guardian appointed by said court has not hitherto failed or refused to comply with any order of said probate court in relation to the guardianship. When the foregoing bill was filed and at the date of the final decree thereon by the circuit court of the United States for the district of Kansas the estate of said minor was undergoing administration in said probate court for the county of Ottawa, State of Kansas, and said estate is still open and unsettled, so far as that court is concerned, no final settlement or accounting having as yet been had between the guardian and the minor in said court.

In view of the premises the circuit court of appeals hereby certifies to the Supreme Court of the United States the following questions or propositions of law arising upon the record in the above-entitled cause, concerning which it desires the instruction of the Supreme Court for its proper decision of the case aforesaid:

First. Does the foregoing bill of complaint state a case entitling the complainants named therein or either of them to any form of equitable relief in the circuit court of the United States for the district of Kansas?

22 Second. Had the circuit court of the United States for the district of Kansas jurisdiction in equity of any of the matters and things contained in said bill with respect to which it was asked to grant relief?

Third. Had the circuit court of the United States for the district of Kansas the requisite jurisdiction on a bill filed for that purpose to require the appellant, Henry Morgan, to settle his account in that court as guardian of the minor Robert Morgan, and upon such settlement to require the said Kansas guardian to transfer and surrender the property of said minor in his hands to J. E. Potter, the guardian appointed in the State of Kentucky?

Fourth. Had the circuit court of the United States for the district of Kansas jurisdiction in equity before a final settlement had been

made by the guardian to inquire into the alleged breaches of the guardian's bond mentioned in the first, second, third, fourth, and fifth paragraphs of said bill, and had said court jurisdiction to render a money decree against the principal and the sureties in the guardian's bond for the damages sustained by the minor in consequence of the alleged breaches of said bond or any of them?

23 In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the said eighth circuit, have hereto set their hands this twentieth day of March, A. D. 1894, at the city of St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
Circuit Judge.
WALTER H. SANBORN,
Circuit Judge.
AMOS M. THAYER,
District Judge.

UNITED STATES OF AMERICA, *Eighth Circuit,* } ss.:

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Henry Morgan, guardian of Robert Morgan, a minor; Jacob Campbell, and M. A. Arnott, appellants, *versus* J. E. Potter, guardian of Robert Morgan, and Sarah Lee Williams, as next friend of said Robert Morgan, a minor, appellees, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this 20th day of March, A. D. 1894.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals, eighth circuit. December term, 1893. No. 350. Henry Morgan, guardian, &c., *et al.*, appellants, *vs.* J. E. Potter, guardian, &c., *et al.*, appellees. Certificate of questions for instructions of the Supreme Court U. S. Filed Mar. 20, 1894. John D. Jordan, clerk.

Endorsed on cover: Case No. 15,572. U. S. circuit court of appeals, eighth circuit. Term No., 690. Henry Morgan, guardian of Robert Morgan, a minor; Jacob Campbell, and M. A. Arnott, appellants, *vs.* J. E. Potter, guardian of Robert Morgan, & Sarah Lee Williams, as next friend of said Robert Morgan, a minor. Filed April 13th, 1894.

157-195
1890

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY MORGAN, Guardian of [illegible],
Appellant,

vs.

J. E. POTTER *et al.*,
Appellees.

MOTION TO ADVANCE.

REED & TOWNSHEND,
GARVER & POND,
Solicitors for Appellant.

T. F. GARVER *of Counsel*.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY MORGAN, Guardian, *et al*,
Appellants,

vs.

J. E. POTTER, *et al*,
Appellees.

MOTION TO ADVANCE.

Come now the appellants in the above case and move the Court to advance the hearing of the questions certified to this Court by United States Circuit Court of Appeals for Eighth Circuit for the instruction of this Court in the decision of this case, and to set the same down for hearing at as early a day as possible.

The suit was originally brought in the United

States Circuit Court for the District of Kansas by J. E. Potter, as the Kentucky guardian of Robert Morgan, minor, against appellants, Henry Morgan, as guardian of the same minor, and the sureties on his bond, for the purpose of effecting a change of the guardianship and custody of the estate from the Probate Court of Ottawa County, Kansas, to the County Court of Warren County, Kentucky. The Circuit Court entered a decree against appellants for what the Court found to be the full value of the estate; adjudged such sum to be a lien upon all the real and personal property belonging to the minor in the hands of Morgan, guardian; and directed that such property be sold and converted into money and paid over to the Kentucky guardian. Further facts, as stated by the Circuit Court of Appeals in the certification to this Court, are as follows:

"When the foregoing bill of complaint was filed "in the Circuit Court of the United States for the "District of Kansas, the estate of said Robert Mor-"gan, minor, was and now is, undergoing adminis-"tration in the Probate Court for the County of "Ottawa, State of Kansas. The guardian appointed "by said Probate Court had filed an inventory "therein pursuant to the laws of Kansas, which he "claimed to be a true account of all the property of "said ward in his custody. He had also filed there-"in each year, pursuant to the laws of Kansas, an "annual report or account, which he claimed to be a

"true and correct account of the condition of said "ward's estate in his hands. The inventory and an- "nual settlements aforesaid had not been excepted "to in said Probate Court, nor the correctness thereof "otherwise challenged, by the said minor or any one "acting in his behalf. So far as appears, the guar- "dian appointed by said Court has not hitherto failed "or refused to comply with any order of said Probate "Court in relation to the guardianship. When the "foregoing bill was filed and at the date of the final "decree thereon by the Circuit Court of the United "States of the District of Kansas, the estate of said "minor was undergoing administration in the Pro- "bate Court for the County of Ottawa, State of "Kansas, and said estate is still open and unsettled "so far as that Court is concerned, no final settlement "or accounting having as yet been had between the "guardian and the minor in said Court.

"In view of the premises the Circuit Court of "Appeals hereby certifies to the Supreme Court of "the United States the following questions or prop- "ositions of law arising upon the records in the "above entitled cause, concerning which it desires "the instruction of the Supreme Court for the proper "decision of the case aforesaid.

"*First.* Does the foregoing bill of complaint state "a case entitling the complainants named therein, or "either of them, to any form of equitable relief in

"the Circuit Court of the United States for the Dis-
"trict of Kansas?

"*Second.* Had the Circuit Court of the United
"States for the District of Kansas jurisdiction in
"equity of any of the matters and things contained
"in said bill with respect to which it was asked to
"grant relief?

"*Third.* Has the Circuit Court of the United
"States for the District of Kansas the requisite juris-
"diction, on a bill filed for that purpose, to require
"the appellant Henry Morgan, to settle his account
"in that Court as guardian of the minor, Robert
"Morgan, and upon such settlement to require the
"said Kansas guardian to transfer and surrender
"the property of said minor found in his hands to
"J. E. Potter, the guardian appointed in the State
"of Kentucky?

"*Fourth.* Had the Circuit Court of the United
"States for the District of Kansas, jurisdiction in
"equity before a final settlement had been made by
"the guardian, to inquire into the alleged breaches
"of the guardian's bond mentioned in the first, sec-
"ond, third, fourth and fifth paragraphs of said bill,
"and had said Court jurisdiction to render a money
"decree against the principal and the sureties in
"the guardian's bond, for the damages sustained by
"the minor in consequence of the alleged breaches
"of said bond, or any of them?"

Appellants ask for an early hearing and decision

of said questions, in order that they be not unreasonably delayed of a decision of the case by the Court of Appeals to which it has been submitted and before which it is now pending.

REES & TOMLINSON,

GARVER & BOND,

Solicitors for Appellants.

T. F. GARVER *of Counsel.*

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1894.

No. 690.

HENRY MORGAN, Guardian of ROBERT MORGAN, a Minor, JACOB CAMPBELL, and M. A. ARNOTT,
Appellants.

vs.

J. E. POTTER, Guardian of ROBERT MORGAN, a Minor, and SARAH LEE WILLIAMS, as next friend of said ROBERT MORGAN,
Appellees.

No. 15,572.

REES & TOMLINSON,
GARVER & BOND,
Solicitors for Appellants.

T. F. GARVER of Counsel.

REPUBLICAN JOB ROOMS, SALINA.

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1894.

HENRY MORGAN, Guardian of ROBERT MORGAN, a Minor, JACOB CAMPBELL, and M. A. ARNOTT,
Appellants.

vs.

J. E. POTTER, Guardian of ROBERT MORGAN, a Minor, and SARAH LEE WILLIAMS, as next friend of said ROBERT MORGAN,
Appellees.

No. 690.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This case comes to this court on a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

The questions certified simply involve the jur-

isdiction of the circuit court of the United States, district of Kansas, from which the appeal was taken. Potter was complainant in that court, alleging his appointment as guardian of this same minor, Robert Morgan, by a county court in Kentucky, where the minor then resided, and seeking the custody of the minor's estate from the Kansas guardian, Henry Morgan. The complaint contained various charges of mismanagement of the estate by Morgan, and fraud in obtaining letters of guardianship from the probate court of Ottawa county, Kansas, and prayed:

"That the order appointing said Morgan guardian be set aside and annulled; that complainants recover of him for the use of Robert Morgan the 320 acres of land conveyed to said Robert, and he be required to surrender possession of same; that he be required to account for a reasonable rental value of said land; that he be required to account before the master of this court for all the profits and interests received from the money held by him for Robert Morgan; that they recover of him any real estate purchased with said trust funds which it is to the interest of said ward to claim and to hold, and that they recover judgment against defendants Morgan, Campbell and Arnott for any sum due Robert Morgan, and be permitted to remove all his property to the state of Kentucky, and that they recover of defendants their costs, and further pray that they may have generally such other and further relief as the nature of their case shall require and to this honorable court shall seem meet."—*Record page 6.*

The jurisdictional questions are certified on the following statement of facts by the Court of Appeals:

"When the foregoing bill of complaint was filed in the circuit court of the United States for the district of Kansas, the estate of said Robert Morgan, minor, was and is now undergoing administration in the probate court for the county of Ottawa, state of Kansas. The guardian appointed by said probate court had filed an inventory therein pursuant to the laws of Kansas, which he claimed to be a true account of all the property of said ward in his custody. He had also filed therein each year, pursuant to the laws of Kansas an annual report or account, which he claimed to be a true and correct account of the condition of said ward's estate in his hands. The inventory and annual settlements aforesaid had not been excepted to in said probate court, nor the correctness thereof otherwise challenged by the minor, or by anyone acting in his behalf.

"So far as appears, the guardian appointed by said court has not hitherto failed or refused to comply with any order of said Probate Court in relation to the guardianship.

"When the foregoing bill was filed, and at the date of the decree thereon by the Circuit Court of the United States for the district of Kansas, the estate of said minor was undergoing administration in said probate court for the county of Ottawa, state of Kansas, and said estate is still open and unsettled, so far as that court is concerned, no final settlement or accounting having as yet been had

between the guardian and the minor in said court." —*Record page 17.*

The questions certified are:

"FIRST—Does the foregoing bill of complaint state a case entitling the complainants named therein or either of them, to any form of equitable relief in the circuit court of the United States for the district of Kansas?

"SECOND—Had the circuit court of the United States for the district of Kansas jurisdiction in equity of any matters or things contained in said bill with respect to which it was asked to grant relief?

"THIRD—Had the circuit court of the United States for the district of Kansas the requsite jurisdiction on a bill filed for that purpose to require the appellant, Henry Morgan, to settle his account in that court as guardian of the minor, Robert Morgan, and upon such settlement to require the said Kansas guardian to transfer and surrender the property of said minor in his hands to J. E. Potter, the guardian appointed in the state of Kentucky?

"FOURTH—Had the circuit court of the United States for the district of Kansas, jurisdiction in equity, before a final settlement had been made by the guardian, to inquire into the alleged breaches of the guardian's bond mentioned in the first, second, third, fourth and fifth paragraphs of said bill; and had said court jurisdiction to render a money decree against the principal and sureties in the guardian's bond for the damages sustained by

the minor in consequence of the alleged breaches of said bond, or any of them?"

ARGUMENT.

Scope of questions presented.—On behalf of appellants, we contend that each of these propositions should be answered in the negative. They all relate to the jurisdiction of the circuit court. The third question, however, embraces substantially all the propositions involved in the case. The jurisdiction invoked by the bill requires the exercise of the power suggested in this question. Of course, the court is not called upon to pass upon mere abstract propositions of law. The vital inquiry is, whether the complainants show such a case by their bill as entitles them to the relief demanded. The bill is open to the charge of being multifarious both in the matter of its allegations and as to the parties; but that question is not before this court. The rights of the appellees, the complainants below are not joint. Their rights, whatever they may be, are distinct, and arise from different sources.

First then, as to Potter. He alleges that he, also, is guardian of this minor, receiving his appointment and authority from a Kentucky court, of which state he is a citizen.

Such appointment gives Potter no authority or standing, in Kansas, as guardian. The complainant alleges no other authority. There is no Kansas statute recognizing a foreign guardian, as there is with reference to a foreign administrator. This, of itself, concludes the case adversely to Potter.

Dixon v. Ramey, 3 Cranch 319;
Kerr v. Moore, 9 Wheat. 565;
Noonan v. Bradley, 9 Wall. 394;
Johnson v. Powers, 139 U. S. 156.

However, conceding Potter's right to sue as guardian, the only possible thing he can, in his capacity of guardian, claim, is the possession and custody of the estate. As guardian he has no right to ask for an accounting, nor can he maintain an action on the bond for damages. Those remedies enure to the minor alone, and any proceeding must be in his name. That Potter cannot invoke the jurisdiction of the circuit court of the United States to acquire the possession of property in the custody of the State court is we think, clearly established by decisions of this court.

Sarah Lee Williams, who, the complaint says, appears as next friend of the minor, has no rights, legal or equitable, for the court to determine. It is somewhat difficult to tell, from the complaint, why

she is a party. If the suit had been brought in behalf of the minor, it would be proper for him to sue by his next friend.

But this is not the complaint of the minor. One of the essential allegations of such a bill is that of the requisite diverse citizenship of the parties. This is complied with by avering that Potter and Mrs. Williams are residents and citizens of Kentucky, and the defendants residents and citizens of Kansas. In other parts of the bill Potter and Mrs. Williams are designated as "orator and oratrix;" showing clearly that these two are deemed the complainants, and not Robert Morgan, the minor. It is nowhere alleged that the minor is a citizen of Kentucky. It is alleged that the mother has been successively a resident of Texas, Kansas and Kentucky, of the latter state, with her son, since October, 1886. It does not appear when she became a citizen of Kentucky.

An averment of residence is not equivalent to an averment of citizenship.

Everhart v. Huntsville College, 120 U. S. 223.

The necessary diversity of citizenship must affirmatively appear from the averments of the complaint.

Timmons v. Elyton Land Co., 139 U. S., 378.

If she acquired her citizenship by marriage to Williams, a citizen of Kentucky, that would not, of itself, confer citizenship on the minor son.

Lamar v. Micon, 112 U. S. 452, 470.

Hence we contend, any right to relief under this complaint must be in Potter ; and the first question must be held simply to involve the inquiry whether a case is stated entitling him to relief.

The second question may be broad enough to include such a case as might be made in a complaint filed in the name of the minor. We presume, however, that the propositions will all be determined in the light of the facts certified by the court, rather than by the broad, unsupported averments of the bill. If all the averments of the bill were true as to the fraudulent obtaining of letters of guardianship, the court might say that the attempted proceedings in the state court were all void and a nullity. In that case, Henry Morgan might individually be held to account for the trust he voluntarily assumed. But the bond, and all questions as to liability of sureties, would vanish with the void probate proceedings. That, however, is not this case, as certified by the court of Appeals. The fact of the pendency of the proceedings in the probate court of Ottawa county bears upon every legal proposition sub-

mitted, and should enter into the consideration of the case to modify or change the answer, which otherwise might be given. If we are correct in insisting upon this view of the case, the answer to the second proposition is not of much practical importance.

The principle lying at the foundation of this jurisdictional inquiry, is that which forbids the exercise of jurisdiction by a Federal court, when such exercise necessarily results in conflict with a state court which has custody of the *res*, and which is duly in the exercise of its jurisdiction over the same matter. That principle, as a rule of law, will probably not be disputed. This court has recognized and applied it for many years.

Mr. Justice Brewer, in *Byers v. McAuley*, speaking of this proposition, very tersely states it thus. "It is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court."

Jurisdiction of Probate Court.—Both by constitutional and statutory provisions, the probate courts of the several counties of the state are given special charge of the estates of minors. The sections of the Kansas statutes set out in the printed record, at pages 15 and 16, show how ample these provisions are. As soon as the

authority of the probate court is invoked, it reaches out and takes into its custody and care all the minor's estate, setting over it a guardian, who is simply the hand of the court to execute its mandates. After the court has thus assumed the authority vested in it, its jurisdiction knows no limits other than the necessities and interests of the estate. It is not a case where the court acquires jurisdiction to do a particular thing, or to order concerning a particular *res*, only when certain preliminary steps are taken by some one applying to the court. The first act of the court in appointing the guardian to take charge of the estate, brings such estate within the pale of its jurisdiction, and vests it with full power to make any order, even on its own motion, which the interests of the minor or of the estate may seem to require It is like a case of attachment where the court takes into its custody, by the proper officer, certain property; by that act of acquiring possession, the court has complete and exclusive jurisdiction of the *res* to make any order concerning it. The guardian is never outside the limit of the court's authority; every act of his is not only under the eye of the court, but is absolutely subject to the court's direction. Section 3226 illustrates this. It reads:

"SEC. 3226. Guardians of the property of minors must prosecute and defend for their wards. They must, also, in other respects, manage their

interests under the direction of the court; they may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards."

The probate court orders how the guardian shall invest the ward's money, and approves and confirms acts that were done without previous express orders. It may pass upon any question, dispute, or claim that is presented, and its decision has to be obeyed by the guardian. Upon the filing of an inventory, or annual account, by Morgan, it became the duty of the court to investigate and determine as to all matters involved therein. It could approve, reject, modify, or otherwise order, as it deemed best for the interest of the ward, and

"SEC. 3235. A failure to comply with any order of the court in relation to the guardianship shall be deemed a breach of the condition of the guardian's bond."

Conflict of Federal Jurisdiction.—In the face of such a situation, it is contended that the guardian may be cited to a court of an entirely foreign jurisdiction, and required to again account and answer for this estate, in accordance with the views which such court may entertain as

to the ward's interests. The lapse of time may demonstrate that investments made, and acts done, which, at the time, met the approval of the probate court were not the wisest nor best. Depreciation in values of one class of property, may suggest that it would have been better to have selected another class for investment. Thus we have another court, without pretense of supervisory power, attempting the very thing already done by a court specially empowered for such work. If it appeared that the acts complained of were in disregard of the order of the court, or that the court did not still have full jurisdiction to direct and order all things necessary, a different question would be presented. But nothing of the kind exists. The court of Appeals finds: (Record page 17) "The inventory and annual settlements aforesaid had not been excepted to in said probate court, nor the correctness thereof otherwise challenged by the minor, or by anyone acting in his behalf. So far as appears, the guardian appointed by said court has not hitherto failed or refused to comply with any order of said probate court in relation to the guardianship * * and said estate is still open and unsettled so far as that court is concerned."

Suppose the Federal court should say that a certain investment was not proper, and that the guardian should in his account, be charged with the

amount of it; in a future settlement with the probate court, he makes up his account in accordance with the decision of the Federal court, and charges himself with the money he had put in the disapproved investment; in the meantime, however, the investment had proven valuable much beyond the original sum, and the probate court says that the investment that had been once approved by it must be still accounted for by the guardian as the investment and property of the ward. By which decision would the hapless guardian be governed? How would he do his duty and not be in contempt? Or, in the accounting, suppose the Federal court allows him an item of expense, or for a claimed unavoidable loss of assets, which the probate court says is not a just claim and refuses to allow it. Which governs in such case?

Certainly it will not be contended that the jurisdiction of the probate court can be terminated, by a Federal court assuming to step in and take upon itself all these matters which pertain to the administration of an estate. That belongs to the probate court; and, while its jurisdiction is not exclusive as to all matters, its judgment is not subject to the supervision of a court of foreign jurisdiction. The ward's estate is still in the custody of the probate court; the guardian is still subject to its direction; and a failure to do as directed by the probate court, in the management of the estate, is,

by express statute, made a breach of the bond.

The serving of two masters in such dilemma, is not only inequitable, but is clearly impossible. True, the Federal court, by virtue of its general equity jurisdiction, may have cognizance of matters which might, also, be presented to, and legally determined by, a State court, even as affecting the administration of estates. But, that jurisdiction should not, under such circumstances, be exercised by the circuit court of the United States, is a rule established by repeated decisions of this court.

Two Classes of Cases.—We find two classes of cases between which are well defined lines of distinction.

In the one class, where the jurisdiction is denied, the effect of the exercise of jurisdiction would be to strike down the authority of the State court by depriving it of the *res* of which it at the time had custody, and the disposition of which it had right to direct and control. In the other class, where the exercise of a concurrent jurisdiction is permitted, the court simply determines the rights of parties as such rights exist between them, without affecting the status of property in other legal custody, and without attempting to adjudicate matters pending in a State court.

Buck v. Colbath, 3 Wall. 334, and
Payne v. Hook, 7 Wall. 425. are examples of the latter class.

Payne v. Hook is much relied upon by appellees in this case. The distinction between that case and the one at bar is clear. In that, there was no question as to custody or control of the estate. A distributee sued to obtain her distributive share of an estate—to recover what was then due her from the administrator. Only by such a suit could distribution be enforced. When the debts were paid, it was the duty of the administrator to distribute the money remaining in his hands belonging to the estate. The Missouri statute, under which the right was claimed, made it the duty of the administrator to pay a distributee, even before final settlement, when so directed by the probate court; and upon a failure to pay, the statute expressly authorized proceedings on the bond in another court to obtain distribution. So far as the probate court was concerned, its jurisdiction was not interferred with in the least, and such suit, the divers citizenship existing, could be brought as well in the Federal as in a State court of general jurisdiction. A case analogous in principle would arise, if, in the administration or this Morgan estate, the probate court had, on proper application, directed the Kansas guardian to turn the property over to the Kentucky guardian,

and he had failed to do so. In such event, we concede the right to institute proceedings on the bond, in any court having jurisdiction of the parties, to enforce the right thus vested in the Kentucky guardian. The right then existed by virtue of proceedings had in accordance with the laws of the state; and the remedy to enforce that right might be had in some court other than the probate court. Property rights are so far subject to the control of the laws of the state in which the property is situated, that the removal of the estate of a minor may be forbidden except upon certain conditions. In Kansas that condition is the approval and order of the probate court. Until such order is made there is no *right* to remove, to be enforced in any court. On the other hand, the decisions of this court have emphasized, by repeated enunciations, the rule for which we contend as applicable in this case.

Some Cases in Point.—In *Hagan v. Lucas*, 10 Pet. 400, the court was called upon to consider the proposition, whether, under process from a Federal court, property could be levied on which at the time was in the custody of one who held it by virtue of a bond executed by him by which he bound himself to account for it to a State court. This court denied the authority of the Federal court upon the ground that the property was in custody of

a State court, and that the Federal court could not interfere so as to affect the jurisdiction and authority of the State court.

Vaughan v. Northup, 15 Pet. 1, was a suit brought in the circuit court of the District of Columbia, by certain heirs of an intestate, against the administrator, seeking to have distribution made of certain assets of the estate which were received in said district. The administrator had been appointed and his letter issued by the proper court of Jefferson county, Kentucky, of which county the deceased was an inhabitant at time of his death. The bill was dismissed on the ground that the administrator was bound to account for such assets to the court appointing him, and that the Federal court had no right to interfere. In the opinion by Mr. Justice Story, it is said: "The administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets, according to the *lex loci*."

In *Peck v. Jenness*, 7 How. 612, we have a fair illustration of the confusion certain to result from such attempted exercise of jurisdiction over

matters peculiarly committed to another tribunal. In that case property had been taken by attachment issued in an action pending in a State court. The defendants were thereafter granted the benefits of the bankrupt law, and given a discharge by the district court of the United States in New Hampshire. The validity of the attachment lien was sustained by the State court in face of a previous decision of the district court that the lien was not valid. The State court first had jurisdiction of the property in question. On hearing in the Supreme court of the United States, it was held that the district court had no right to interfere with the custody and control of the property over which the State court first had full jurisdiction. It was the same question of the exercise of power by a Federal court when the effect is to disturb the legal and regular administration of its affairs by a State court. Speaking of this principle, in the opinion Mr. Justice Grier, said: (Page 624.)

"It (the State court) had full and complete jurisdiction over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the district court, a foreign forum, in every way its equal. * * * It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it

has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

The same principle controlled the decision of *Peale v. Phipps*, 14 How. 368. In that case the circuit court of the United States for the eastern district of Louisiana assumed jurisdiction to control and appropriate the assets in the hands of the trustee and assignee of a defunct Mississippi corporation, which he held under appointment of a State court in the latter state. The laws of Mississippi required the assignee to return an inventory and render accounts to the court appointing him, and dispose of the assets as directed by law. The circuit court awarded an execution to be satisfied out of the assets of the corporation in the trustee's

hands. Such assumed jurisdiction and power, the Supreme court held to be unauthorized.

The opinion of the court, was given by Mr. Chief Justice Taney, who, in the course of the decision said:

"We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

In *Buck v. Colbath*, 3 Wall. 334, 341, Mr. Justice Miller speaks of the principle running through and controlling the decision in this class of cases, as "A principle which is essential to the dignity and just authority of every court, and to the

comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. * * * A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit."

Covell v. Heyman, 111 U. S. 176, involved the same principle. In that case the Federal court had acquired jurisdiction of certain property by virtue of an execution levied upon it. A party, other than the defendant in the execution, claiming the property, replevin in a State court. The action was defeated because it was an interference with property in custody of another court and subject to its jurisdiction. Mr. Justice Matthews delivering the opinion of the court, said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between the State courts and those of the United States, it is something more. It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and although they co-exist in the same space they are independent and have no common superior.

"They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by foreign process is futile and void."

Byers v. McAuley, 149 U. S. 608, was a case where the circuit court assumed the administration of an estate, and attempted to draw to it all the powers and prerogatives of the court of probate to the prejudice of the latter tribunal. As a consequence, the administrator, thus placed between two fires, had to play fast and loose in the State court in the endeavor to harmonize his actions there with what the circuit court required of him. But the usurpation of judicial power was no greater in that

case than in this. That it was unwarranted in both, is shown very forcibly and conclusively by the logical opinion given therein by Mr. Justice Brewer. That opinion, also, makes very clear the distinction between this class of cases, and the class wherein jurisdiction is sustained; and, in all respects, we think, fully sustains our contention upon the propositions certified by the Court of Appeals.

To the same effect are:

Williams v. Benedict, 8 How. 107, 112;

Freeman v. Howe, 24 How. 450;

Yonley v. Lavender, 21 Wall. 276, 279;

Rio Grande Ry. Co. v. Gomilla, 132 U S., 478.

The Fourth Proposition.—The fourth proposition certified does not as broadly question the jurisdiction of the circuit court as the others do. It presents the question, whether the circuit court can interpose its authority to consider and correct alleged errors, mistakes, and irregularities, in the administration of the estate, when there has been no order of the probate court disobeyed, and when the very matters complained of have been considered and approved by that court. Copies of the inventory and first annual settlement, which were filed by Morgan, as guardian, and approved by the probate court, are attached to, and made part of, the

bill of complaint; and it must be observed, the matters complained of entered into such inventory and settlement. The alleged breaches of the guardian's bond are set out in the following paragraphs of the bill:

"1.—Said Morgan failed to file a true or just inventory of the estate of his said ward, as required by the laws of Kansas, but instead thereof, he filed a pretended inventory which was both false and fraudulent, a copy of which is filed as a part hereof, marked, 'H. M. No. 2.' They say it is not true that said infant was the owner of 70 head of cattle, or 1 thoroughbred cow, or of any heifer, or of any mules, or wagon, or harness, or harrow, or plow, or stalk-cutter, or cultivator, or mower, or rake, or hogs, or corn, and they say it is not true that such articles or property were worth the sum of $3,241.00: but they say that said Morgan purchased all of the same for his own use and benefit; and in order to cheat and defraud his said ward he attempted in said inventory to transfer said property to his ward at a greater sum than its actual value, and at a greater sum than its cost to him, and withheld from him and excluded from his inventory interest-bearing mortgages executed for the money placed in his hands as aforesaid by your oratrix to be invested and used for his said ward, and with-held in like manner valuable real estate purchased by said Morgan with the trust funds aforesaid and the title to which he illegally took in his own name.

"2.—Complainants say further that said inventory is false and fraudulent in this, that the 320

acres named therein was purchased by said Morgan with the trust funds aforesaid on the....day of ....., 18.., at the sum of $6,100, and was never worth at any time the sum of $35 per acre. If it was worth the said sum, the said infant could only be charged in the inventory with its cost in accounting for his estate. Complainants say further, that the 320 acres of land named in said inventory, had been used by said Morgan for his own use and benefit; that he had received the proceeds of same and the crops from same and failed to account for same in any way in his inventory.

"3.—Complainants say further, that he failed in said inventory to account for more than $5,000, to-wit, $——and interest upon same, being a part of the original trust funds placed in his hands as aforesaid by your oratrix. The exact amounts of same are unknown to your complainants and cannot be stated, but they call upon defendant Morgan to state the disposition he has made of all said funds and how he has invested them.

"4.—Complainants say, that in his said inventory he fails to account for $1,140.00 profit on a tract of land, sold by him to Wait Pearsoll, January 5, 1887, and for $70 realized on the sale of lot 2, block 5, in addition to Minneapolis, sale being made Nov. 29, 1886, and for $1,360.00 profit realized on sale to Sarah L. Morgan, of section 23, township 11, range 5, February 4, 1885, and for $175 profits on a sale of real estate made to Sarah L. Morgan, March 5, 1884, and for various other profits realized from sales of property purchased with said ward's

funds, unknown to these complainants. Complainants say that they believe and charge that all the lands aforesaid were purchased with the funds placed in the hands of said Henry Morgan by your oratrix to be invested, as before alleged, for said Robert, and said Morgan is called upon to answer specifically from whom and how he got the funds with which all the lands aforesaid were purchased.

"5.—Complainants say further, that on the 25th day of February, 1888, the defendant, Morgan, filed before the probate judge aforesaid a paper purporting to be an annual settlement of his said ward's estate, but they say that in said account he fails to account for the interest upon said ward's money to the amount of $——, the exact amount of which is unknown to the complainants, and that he therein charges him with loss on personalty illegally charged to him in his original inventory to the amount of $——, as aforesaid, and illegally fails to account for the reasonable annual rental value of his said ward's estate, to-wit, $——, and say further, that he illegally charges therein for his personal services $600.00, when his services were not worth one dollar or any other sum to the said ward or his estate, but, on the contrary, he had acted for himself and his own interest and to the injury of his said ward. He files as a part hereof, a copy of said paper marked 'H. M. No. 3,' and they also file as a part hereof a copy of the petition filed before said probate judge as a part hereof marked 'H. M. No. 4,' and they also file as a part hereof the receipt of said Morgan to Mrs. J. T. Williams, of date April 13, 1887, as part hereof marked 'H. M. No. 5.'"

The bill thus alleges that various items of the inventory and settlement were illegal, and should not be allowed in favor of the guardian, and that he should be charged with other items. It must be noted, however, that there is no allegation of fraud perpetrated upon the court, or that the approval by the court of the acts of the guardian was secured by any wrongful practices.

Even admitting, for the argument, that some of the complaints are well founded, and that the accounts in some particulars should be corrected; then, we inquire, what is the source of the claimed jurisdiction of the circuit court of the United States, that authorizes it to sit as a court of review, and to say that the holding of the probate court in these matters was erroneous? It will certainly not be claimed that the circuit court has original jurisdiction in respect to the administration of this estate.

The most that can be claimed for it is, that it may exercise concurrent jurisdiction in some matters of which the probate court may, also, have jurisdiction; that the jurisdiction of neither is exclusive. At same time, it must be admitted, when the jurisdiction of one has attached, that of the other cannot be exercised.

In this case, however, we deny concurrent jurisdiction of the circuit court in respect to the matters complained of in the foregoing paragraphs. There can be no breach of the guardian's bond as

long as no order of the probate court in respect to the estate is disregarded.

The state of Kansas has the right to provide by statute for the control and disposition of this property, and to establish personal rights in respect thereto. Such rights being established, the enforcement of them may be by remedies over which the state has not absolute control, and by a suit in a Federal court, even when the state law expressly attempts to forbid it. But the Federal courts cannot create rights of or to property which do not exist under state laws. They may, by appropriate remedies, enforce existing rights. So in this case; the statutes of Kansas fix the status of this property, and establish the rights of the parties with reference to it.

The liability of the guardian and his sureties on the bond, is also a creature of the statute which courts cannot change or enlarge. The condition of the bond is, that the guardian "shall faithfully discharge the duties of such guardian according to law." His duties are discharged according to law, when performed in accordance with the directions of the probate court, or with its approval; and, "a failure to comply with any order of the court in relation to the guardianship shall be deemed a breach of the condition of the guardian's bond." Sec. 3235 heretofore quoted.

An affirmative answer to the fourth question propounded by the Court of Appeals, would say to the sureties on such bond, there is a breach if he doesn't, and there is a breach if he does; provided the circuit court's views are not in accord with those of the probate court. Certainly such answer cannot emanate from a court of equity.

When sureties liable.—This fourth question, in addition to the general proposition just discussed, also involves the right to maintain this suit against the sureties on the bond, even admitting that the guardian himself may be called upon, in this way, to account. On behalf of the sureties, the contention against the jurisdiction of the circuit court is even stronger than it is as to the guardian. There has been no failure of their principal to obey the orders of the probate court; nor has he been found guilty of any breach of his bond. We understand the general rule in such cases to be, that an action cannot be maintained against sureties on the bond, until after a breach has been established, or until the principal has failed to act in obedience to the order of the court.

Stillwell v. Mills, 19 John. 304;
Salisbury v. Van Hoesen, 3 Hill 77;
Perkins v. Stimmell, 114 N. Y. 359;

O'Brien v. Strong, 42 Ia. 643;
Gillespie v. See, 72 Ia. 345;
Kugler v. Prien, 62 Wis. 248;
Appeal of Rau, 144 Pa. 304;
Ordinary v. Heishon, 42 N. J. L. 15;
Ball v. La Clair, 17 Neb. 39;
Bisbee v. Gleason, 21 Neb. 534;
Allen v. Tiffany, 53 Cal. 16;
Newton v. Hammond, 38 O. S. 430.

Reason and authority, as well as the comity existing between Federal and State courts, strongly appeal for the with-holding of jurisdiction by the circuit court of the United States in this case; and in the hope that the jurisdiction claimed will not be asserted, and to aid in such determination, these observations are respectfully submitted.

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T. F. GARVER of Counsel.

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No. 690.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

HENRY MORGAN, GUARDIAN OF ROBERT MORGAN, A MINOR, JACOB CAMPBELL, AND M. A. ARNOTT, *Appellants*,

vs.

J. E. POTTER, GUARDIAN OF ROBERT MORGAN, AND SARAH LEE WILLIAMS, AS NEXT FRIEND OF SAID ROBERT MORGAN, A MINOR, *Appellees*.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEES.

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B. F. PROCTOR,
CHAS. BLOOD SMITH,
Solicitors for Appellees.

CHAS. BLOOD SMITH,
Of Counsel.

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No. 690.

IN THE SUPREME COURT
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STATEMENT.

THIS cause is pending before this court upon certificate from the United States Circuit Court of Appeals for the Eighth Circuit, wherein said court certifies certain questions of law arising upon the record concerning which it desires the instruction of this court for its proper decision of the case pending before it.

From an examination of the record certified, it appears that the bill of complaint is brought by J. E. Potter, guardian of the minor, and by Sarah Lee Williams as next friend of the minor, Robert Morgan, jointly, both of whom are citizens of the State of Kentucky, against Henry

Morgan, the Kansas guardian of said minor, and Jacob Campbell and M. A. Arnott, bondsmen of said Henry Morgan, guardian, all of said defendants being citizens of the State of Kansas.

A further examination of the bill discloses the fact that it is twofold in its object: First, to surcharge Morgan's *ex parte* settlements with the Probate Court of Kansas and ascertain what the estate actually consists of; and second, to transfer the estate so determined to Kentucky, through Potter, the minor's guardian, where both the minor and Mrs. Williams, his mother, the natural guardian of the minor, reside.

The bill also charges fraud in the appointment of the Kansas guardian and many specific acts of maladministration and mismanagement by the Kansas guardian from the date of his appointment to the time of filing the bill; and prays —

"That the order appointing said Morgan guardian be set aside and annulled; that complainants recover of him for the use of Robert Morgan the 320 acres of land conveyed to said Robert, and that he be required to surrender possession of same; that he be required to account for a reasonable rental value of said land; that he be required to account before the master of this court for all the profits and interests received from the money held by him for Robert Morgan; that they recover of him any real estate purchased with said trust funds which it is to the interest of said ward to claim and to hold; and that they recover judgment against defendants Morgan, Campbell and Arnott for any sum due said Robert Morgan, and be per-

mitted to remove all his property to the State of Kentucky, and that they recover of defendants their costs; and further pray that they may have generally such other and further relief as the nature of their case shall require and to this honorable court shall seem meet."

The record discloses that a demurrer was interposed in the Circuit Court for want of equity in the bill, which was subsequently overruled, and the defendants answered to the merits; upon which answer the complainants joined issue.

The Circuit Court of Appeals also certified conceded facts as follows:

"When the foregoing bill of complaint was filed in the Circuit Court of the United States for the District of Kansas, the estate of said Robert Morgan, minor, was and now is undergoing administration in the Probate Court for the county of Ottawa, State of Kansas. The guardian appointed by said Probate Court had filed an inventory therein, pursuant to the laws of Kansas, which he claimed to be a true account of all the property of said ward in his custody. He had also filed therein each year, pursuant to the laws of Kansas, an annual report or account, which he claimed to be a true and correct account of the condition of said ward's estate in his hands. The inventory and annual settlements aforesaid had not been excepted to in said Probate Court, nor the correctness thereof otherwise challenged by the minor or by anyone acting in his behalf. So far as appears, the guardian appointed by said court has not hitherto failed or refused to comply with any order of said Probate court in relation to the guardianship. When the foregoing bill was filed, and at the date of the final decree thereon by the Circuit Court of the United States for the District of Kansas, the estate of

said minor was undergoing administration in said Probate Court for the county of Ottawa, State of Kansas, and said estate is still open and unsettled, so far as that court is concerned, no final settlement or accounting having as yet been had between the guardian and the minor in said court."

The following are the questions certified:

"*First:* Does the foregoing bill of complaint state a case entitling the complainants named therein, or either of them, to any form of equitable relief in the Circuit Court of the United States for the District of Kansas?

"*Second:* Had the Circuit Court of the United States for the District of Kansas jurisdiction in equity of any matters or things contained in said bill with respect to which it was asked to grant relief?

"*Third:* Had the Circuit Court of the United States for the District of Kansas the requisite jurisdiction on a bill filed for that purpose, to require the appellant, Henry Morgan, to settle his account in that court as guardian of the minor, Robert Morgan, and upon such settlement to require the said Kansas guardian to transfer and surrender the property of said minor in his hands to J. E. Potter, the guardian appointed in the State of Kentucky?

"*Fourth:* Had the Circuit Court of the United States for the District of Kansas jurisdiction in equity before a final settlement had been made by the guardian, to inquire into the alleged breaches of the guardian's bond mentioned in the first, second, third, fourth and fifth paragraphs of said bill; and had said court jurisdiction to render a money decree against the principal and sureties in the guardian's bond for the damages sustained by the minor in consequence of the alleged breaches of said bond, or any of them?"

ARGUMENT.

From an examination of the questions certified, it readily appears that they all bear upon the jurisdiction of the United States Circuit Court, sitting as a court of equity, to retain the bill and grant any relief; and if this court should answer in the affirmative the first question certified, then it would necessarily follow that the same answer should be given to the second and third questions certified. Consequently, we will confine our argument at the present time to endeavoring to sustain the jurisdiction of the court under the first question certified.

It is clear, as shown by the bill, that a controversy exists between citizens of different States; that is, on behalf of the complainants, who are citizens of Kentucky, against the defendants, who are citizens of the State of Kansas. So far as the bill is concerned, the allegations of citizenship are sufficient to give the Federal court jurisdiction over the subject of controversy contained in the bill. Therefore, it follows that if the Federal court cannot grant any form of equitable relief under the bill, it is either because the bill discloses a plain and adequate remedy at law, or that sufficient facts are not pleaded to warrant a court of equity in granting relief.

From an examination of the bill, it would appear too clear for argument, that a court entertaining general chancery powers would have jurisdiction over the subject-matter of the bill, unless restricted by some positive statute,

or that the complainants had a plain and adequate remedy at law given them by statute.

It is strongly contended by appellants that upon the probate court of Kansas assuming jurisdiction over the estate of the minor and appointing a guardian over his person, that such court drew to itself sole and exclusive jurisdiction with reference to all property rights of the minor; that by "that act of acquiring possession the court has complete and exclusive jurisdiction of the *res* to make any order concerning it." If such contention can be maintained, then it follows that the Federal court and all other courts except the probate court of Kansas is without jurisdiction over any of the affairs of the minor. The language of the constitution of the State of Kansas creating the probate court is as follows:

"There shall be a probate court in each county, which shall be a court of record and have probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound mind, as may be prescribed by law. . . . This court shall consist of one judge, who shall be elected by the qualified voters of the county, and hold his office two years. He shall be his own clerk, and shall hold court at such times and receive for compensation such fees as may be prescribed by law."

The constitution itself does not give the probate court sole and exclusive jurisdiction, but simply clothes it with power to administer over the estates of minors the same as a court of chancery would have if no probate court had ever been created in the State of Kansas; and the several

statutes prescribing the jurisdiction of the probate court do not give exclusive jurisdiction to such court over minors or their guardians.

"The district courts of the State of Kansas are courts of record of general jurisdiction." (Section 6, article 3, Constitution; paragraph 1, chapter 28, General Statutes.)

These district courts possess all the equitable jurisdiction which was possessed by the courts of equity before the adoption of a code, and are courts of general equity jurisdiction. In Kansas it was early contended that the constitution creating probate courts and the statutes conferring powers upon them gave them exclusive jurisdiction over all probate matters. This exclusive jurisdiction, however, has been denied by the Supreme Court of Kansas in numerous opinions.

In *Shoemaker v. Brown*, 10 Kas. 390, decided in 1872, the Supreme Court of Kansas in deciding against such contention held as follows:

"The subject of this action is unquestionably a subject of chancery jurisdiction; for the courts of chancery always had paramount jurisdiction over the estates of deceased persons, and generally had jurisdiction over all trust estates. Therefore, if the district courts of this State have full chancery powers in this respect, then they must have jurisdiction in cases of this kind. The statute prescribing the jurisdiction of the district court reads as follows:

"'SECTION 1. There shall be in each county organized for judicial purposes a district court, which shall be a court of record, *and shall have general original jurisdiction* of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general super-

vision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses.' (Gen. Stat. 304.)

"This statute is certainly broad enough to give to the district courts full chancery and common-law jurisdiction. (See also, Comp. Laws, 454, §§ 1 and 2.) And unless such jurisdiction is taken away by some other statute, we suppose the district courts may exercise the whole of it. We would read said statute as follows: The district court 'shall have general original jurisdiction of all matters both civil and criminal, [where] not otherwise provided by law.' The plaintiffs in error would read it as follows: The district courts 'shall have *general* original jurisdiction of *all matters* both civil and criminal [where such matters are] not otherwise provided [for] by law [by giving the jurisdiction of such matters to some other court.]' Or in other words: The district courts 'shall have *general* original jurisdiction' of *such matters only as may be left* after giving the other courts their respective jurisdictions. We do not think that this reading of the plaintiffs in error is correct. Probate courts have jurisdiction over all claims against the estate of a deceased person, (Gen. Stat. 449, § 87;) and yet it is not infrequent for parties to sue administrators in the district court on such claims. 'A mortgage may be foreclosed in the district court, although the defendant or one of the defendants should be an administrator; and a foreclosure judgment rendered in the district court against the deceased in his lifetime may be revived in the same court after his death against his administrator and heirs.' (*Brenner v. Bigelow*, 8 Kas. 497.) 'Justices of the peace have original jurisdiction of civil actions for the recovery of money only, and to try and determine the same where the amount claimed does not exceed three hundred dollars.' (Laws of 1870, p. 181.) And yet it has been decided in this court that under the foregoing statute district courts also have jurisdiction, in such cases, where the amount exceeds one hundred dollars and does not exceed three hun-

dred dollars. (*Henderson v. Kennedy*, 9 Kas. 163.) We might give other examples, but we deem these sufficient. But it is claimed that jurisdiction in cases of this kind is given to probate courts. This is true. But we do not think the jurisdiction of the district courts is thereby taken away. The principal statute giving jurisdiction to probate courts, so far as it applies to this case, reads as follows:

"'SECTION 1. The probate courts shall be courts of record, and within their respective counties shall have original jurisdiction: . . . *Third*, To direct and control the official acts of executors and administrators, settle their accounts, and order the distribution of estates; . . . *Seventh*, To have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons.' (Gen. Stat. 313, 314, § 1. See also Gen. Stat. 454, §§ 114, 115, 119, 120.)

"The mere giving of jurisdiction to one court does not show that it must be exercised exclusively by that court. The constitution gives to the Supreme Court original jurisdiction in *quo warranto*, *mandamus*, and *habeas corpus*, (art. 3, § 3,) and also gives to the probate courts original jurisdiction in *habeas corpus*, (art. 3, § 8;) but still it has never been supposed that either of these courts had exclusive original jurisdiction in any one of these matters, for the Legislature has given such jurisdiction also to the district courts: Gen. Stat. 759, §§ 652, 653; page 766, § 688; page 762, § 662; Laws of 1871, page 190; *Judd v. Driver*, 1 Kas. 455; *Gordon v. The State*, 4 Kas. 489; *Leavenworth Co. v. The State*, 5 Kas. 688. And as we have already seen, the giving of justices of the peace jurisdiction in cases where the amount does not exceed three hundred dollars does not take away the jurisdiction of the district courts where the amount is between one hundred and three hundred dollars: *Henderson v. Kennedy*, *supra*. Indeed, it is a general rule that a mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of constituting the former a court of

concurrent jurisdiction with the latter: *Delafield v. State*, 2 Hill, 159. Thus it has been decided in Illinois, that 'Where a jurisdiction is vested in a court of equity, and the like jurisdiction is conferred by statute on a court of law, the presumption is, that it was designed to be concurrent, and not exclusive, unless the court of equity is prohibited or limited in its exercise by the language of the act. And such a legal remedy does not preclude a court of equity from assuming jurisdiction and affording relief.' (*McNab v. Heald*, 41 Ill. 326.) This we think is in accordance with the great weight of authority. See *Martin v. Densford*, 3 Blackf. 297; *Thompson v. Brown*, 4 Johns. Ch. 619; *Judah v. Brandon*, 5 Blackf. 506; and the other cases cited in brief of counsel for defendant in error. But returning to the case at bar, we think it could not have been intended by the Legislature to limit in any respect the jurisdiction of the district courts by passing the acts conferring certain jurisdiction upon the probate courts. It was simply intended to confer such jurisdiction upon the probate courts, and to leave the other courts to exercise just such jurisdiction and powers as the other statutes had given or should give to them. The act concerning executors and administrators shows this. Sections 83 and 86 of said act show that it was not the intention of the Legislature to confer upon probate courts exclusive original jurisdiction in suits against estates. (Gen. Stat. 448, 449.)"

In the case of *Klemp v. Winter*, 23 Kas. 703, decided by the Supreme Court of Kansas in 1880, which was an action brought by Klemp against Winter as guardian, and the sureties on his bond, to recover money wrongfully detained from him, wherein it was contended by the defendants that the probate court had exclusive jurisdiction over the estate of a minor, the court says:

"That fraud vitiates everything it touches — final judgments, final orders, final settlements, and contracts, as well as things of less consequence — we suppose all persons will admit. And that courts, possessing general equity or chancery jurisdiction, have the power to grant proper relief in all cases of fraud, we suppose will also be admitted. But we will refer to a few cases, however, which we think have some application to the particular case now under consideration. These cases to which we refer have reference to settlements made by administrators and guardians, and hold that such settlements where fraudulently made, are not conclusive, but that proper relief may be granted to the party defrauded by other courts than the courts in which the settlements were originally made: *Payne v. Hook*, 74 U. S. (7 Wall.) 425; *Van Bokenen v. Cook*, (decided by the United States Circuit Court of Nevada, September, 1879); *Strong v. Wilkson*, 14 Mo. 116; *Jones v. Brinker*, 20 Mo. 87; *Clyce v. Anderson*, 49 Mo. 37, 43; *Folger v. Heidel*, 60 Mo. 284; *Sheetz v. Kirtly*, 62 Mo. 417; *Speed v. Nelson*, 8 B. Mon. 499, 507; *Green v. Creighton*, 18 Miss. (10 S. & M.) 159; *Dooley v. Dooley*, 14 Ark. 122.

"Under the laws of this State, the district courts of Kansas possess general equity and chancery jurisdiction, as well as general common-law jurisdiction; and unless something can be found to take away a portion of this jurisdiction, or to limit the exercise thereof, the district courts undoubtedly have the power to hear and determine all such cases as the present case. Now there is no law in this State expressly taking away or limiting the jurisdiction of the district court with reference to this particular case or class of cases, and there is no law impliedly doing so, as we think. Hence we think the court below had ample power and authority to hear and determine the present case. It is true that the probate courts of this State have a general jurisdiction over the estates of minors, but there is nothing in the statutes or elsewhere showing that this jurisdiction is in all cases

absolutely exclusive; and the bench and bar of the State have never considered it to be thus exclusive. Suits are frequently brought in the district courts by and against minors, and sustained by the courts, which suits nearly always more or less affect the estates of such minors."

From the foregoing cases it would appear that the Supreme Court of Kansas, construing the jurisdiction of the probate court with reference to the estate of minors and other probate matters, has firmly established the doctrine that the jurisdiction of the probate court over the affairs of a minor is not exclusive, and that the district courts of the State, being courts of general equity jurisdiction, have concurrent jurisdiction with the probate courts in proper cases to administer equitable relief.

The general jurisdiction of equity over the suits of a ward to compel performance of trust duties, or to relieve against violations of trust obligations by the guardian, is summarized in Pomeroy's Equity Jurisprudence, § 1097:

"Equity has, therefore, a general jurisdiction, at the suit of the wards or other beneficiaries, to compel a performance of the trust duties, to relieve against violations of these trust obligations, to direct an accounting and final settlements of the *quasi* trust, and to grant other special relief made requisite by the circumstances. This jurisdiction exists throughout the American States, except perhaps in a very few where statutes have given exclusive control over such matters to some particular tribunal, to be exercised in some prescribed manner."

In the note to the text of the foregoing section, the learned author also states as follows:

"In many of the States, jurisdiction over guardians is given to the probate courts, and modes of annual or final accounting are provided. But this legislation does not interfere with the inherent jurisdiction of equity as a part of its general supervisory powers over trustees." (Citing numerous cases to support the note.)

And again in § 78:

"Under their general power in cases of trust and accounting, the American courts of equity may give all proper relief to wards against their guardians."

Chancellor HARDWICKE, in 1721, in the case of *Duke of Beaufort v. Berty*, 1st Peere Williams' Reports, 704, says:

"This court would and had interfered even in the case of a father, as where the child had an estate, and the father, who was insolvent and of an ill character, would take the profits where the court has appointed a receiver, as was done in the case of *Kiffin v. Kiffin*. Likewise, in answer to the objection that the court should not interpose until the guardians have misbehaved, his Lordship observed that preventing injustice was to be preferred to punishing injustice, and that he ought rather to prevent the mischief and misbehavior of guardians than to punish it when done. That if any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians, as there were in this case, or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the court would interpose and order the contrary, and that this was grounded upon the general power and jurisdiction which it had over all trusts — and a guardianship was most plainly a trust."

And Lord MACCLESFIELD, in the same case and at the same time, says:

"While a guardian appointed according to the statute had no more power than a guardian in socage, and as the court could interfere where there was a guardianship in socage, so might it also do in a case of a guardian by statute, *both being equal trustees.*"

And again, in the Countess of Shaftesbury case, 2d Peere Williams, 107, the Lord Chancellor says:

"The father by the statute has a right to dispose of the guardianship of his child until twenty-one, and having done so here it will be binding unless some misbehavior be shown in the guardian, in which case *it being a matter of trust, this court has a superintendency over it.*"

These cases were approved and the doctrine of trusts affirmed by Chancellor KENT, *In the matter of Andrews*, 1 Johnson's Chancery, 101.

It can scarcely be denied, therefore, that a guardian, being a trustee for the minor, is at all times under the jurisdiction and control of a court of equity.

It is manifest from the very nature of the allegations of complainants' bill, that they had no adequate remedy at law in the Circuit Court of the United States, and their only remedy except filing their bill in equity would be to obtain relief through the probate court of Kansas. We shall show, however, that any rights the complainants have they are entitled to enforce in the Federal courts, owing to the diverse citizenship between the parties. It is not urged by appellants, nor could it be successfully as-

serted, that the appellees have a cause of action at law in the Federal court against the Kansas guardian. The bill, as we have before stated, is not only brought for an accounting against the Kansas guardian to determine the amount of the estate in his hands or that should be there, but for a transfer for the benefit of the minor, of his estate to the minor's domicile and that of his natural guardian, Mrs. Williams, his mother. We apprehend, under the circumstances related in the bill, that a court of equity would have the right to transfer from Kansas to Kentucky for the benefit of the minor, his estate, even if the Kansas statute did not recognize such a right to exist in favor of the minor. But such a right is clearly conferred upon the minor and consequently upon his representatives, by § 3248 of the Kansas statutes, as certified to this court:

"When a minor for whom a guardian has been appointed in this State shall remove to another State or Territory, and a guardian of such infant shall be there appointed, the guardian appointed in this State may be discharged and required to settle his accounts as hereinafter provided."

And then follows provision for the method of obtaining this discharge, and limits it to proceedings had in the probate court.

We contend that if any right exists in behalf of the minor, such right cannot be limited by an act of the Kansas Legislature, to the probate court. Any right con-

ferred by § 3248 upon the minor or his representative can be enforced in the Federal court as well as in the probate court, provided there exists the necessary diverse citizenship to confer upon the Federal court jurisdiction. It must be conceded that an action at law in the Circuit Court could not have given the appellees the accounting prayed for and an order transferring the amount of the estate to the domicile of the minor. The question then is: Is the minor, or his representatives, the appellees, entitled to this accounting and the transfer of the property by a decree of the Federal court, or can they only obtain it by resort to the local probate court? If appellees were not obliged to resort to the local court they certainly have the right to file this bill in the Federal court.

We therefore propose to show that notwithstanding the State statutes referred to, the Federal courts have jurisdiction in equity in a suit brought by a minor through his representatives to compel an accounting by a guardian and to enforce the right of removal of the estate to the domicile of the minor, and that this jurisdiction is not referable to the right to an accounting, but arises from the fact that a guardian is a trustee, and that the *cestuis que trustent* may always resort to a court of equity to obtain relief against a trustee who is betraying his trust or negligently managing it.

It must be conceded that the jurisdiction in equity of the Federal Court as to the remedies is coextensive with

the jurisdiction in chancery as exercised in England, and is not nor can it be affected by any State jurisprudence as to practice and procedure. It was at an early date held in England that notwithstanding the acts of Parliament creating the ecclesiastical courts and giving them jurisdiction over the administration of the personal estate of decedents, that a bill brought for distribution of the estate was properly exhibited in the chancery court, and the demurrer to the bill was overruled on that ground.

Matthews v. Newby and *Howard v. Howard*, 1 Vernon's Rep. 133, 134.

In *Anonymous*, 1 Atkyns, 491, Lord HARDWICKE sustained a bill to enjoin a suit in the ecclesiastical court for a legacy, "because the plaintiff is an executor in trust only; for where there is a trust or anything in the nature of a trust, notwithstanding the ecclesiastical court has an original jurisdiction in legacies, yet this court will grant an injunction, trusts being only proper for the cognizance of this court."

Lord REDESDALE, in the case of *Adair v. Shaw*, 1 Schoales & Lefroys, 262, in a bill filed against the administrators, said:

"The only thing to be inquired in a court of equity is, whether the property bound by the trust has come to the hands of persons who were either bound to execute the trust, or to preserve the property for the persons entitled to it; and the whole jurisdiction of courts of equity in the administration of assets is founded on the principle, that it is the duty of the court to enforce the execution of

trusts, and that the executor or administrator who has the property in his hands, is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the will, or in case of intestacy, according to the statute of distributions. The sole ground on which courts of equity proceed in cases of this kind is *the execution of a trust.*"

In the case of *Crain v. Barnes and Fergusson*, 1 Maryland Ch. 151, the proceeding was by the representatives of a ward against the executors of a guardian. The Chancellor says:

"It is a bill, then, by a ward against her guardian — that is, by a *cestui que* trust, against the trustee. The relation of guardian and ward constituting, as Mr. Justice Story says, the most important and delicate of trusts, and as this relation and the rights and obligations which grow out of it are peculiarly within the jurisdiction of this court, its power to afford a remedy for a breach of the trust cannot be denied, unless it can be clearly shown to have been taken away by some express statutory enactment.

"*In the matter of Andrews*, 1 Johns. Chan. Rep. 99, Chancellor Kent says, that every guardian, however appointed, is responsible in equity for his conduct, and may be removed for misbehavior, and that a testamentary or statute guardian is as much under the superintendence of the court of chancery as the guardian in socage."

The Chancellor, continuing to assert the jurisdiction of courts of equity over a case of this character, says:

"But the jurisdiction of the court is not put upon this ground, but upon the ground that this is one of those cases in which this court, having original jurisdiction, is not deprived of it because the courts of law by statutory enactment may have power over the same subject; the en-

actments giving them authority containing no provisions depriving this court of its ancient jurisdiction. Indeed, the remedy in this court is so much more complete, and the power of the court of law, in many cases involving the administration of assets, so entirely inadequate, that it would be a matter of serious regret if the conferring of jurisdiction upon the latter, should have the effect of ousting the former."

It might be worth while also to note that in this particular case the action was brought by the complainants in their dual capacity as administrators and as next friend of the minor, and that the bill was against the guardian and his bondsmen.

Objections were made on the ground of misjoinder, but the court held:

"There is no conflict between them, the beneficiary interest being admitted by the bill to be in Barnes Compton, the minor, and the administrator of his mother having only become such and united in the suit that a full indemnity might be given the defendant upon the payment of the legacy."

It has been frequently held by this court, that under the provisions of the judiciary act the Federal courts have the same equity jurisdiction where the necessary diverse citizenship of parties exists as was possessed by the High Court of Chancery in England. As far as the equitable jurisdiction of the Federal court over the defendant is concerned, it makes no difference by what method the trust was established. If Morgan should have voluntarily assumed the management and control of the funds of the

minor, thereby creating a trust relationship with him, then the minor or his representatives (the necessary diverse citizenship existing) could obtain relief in the Federal court. This is equally true where Morgan, the Kansas guardian, assumed the trust by virtue of his appointment by the probate court in Kansas. The question is not how the trust was created, but whether there exists a trust relationship between Morgan, the guardian, and the minor and his representatives. It makes no difference whether this trust is imposed by operation of law, or is voluntarily assumed. When it exists, either by his being appointed guardian by the probate court, or voluntarily assuming the management of the affairs of the minor without an appointment, he subjects himself to the decree and control of a chancery court, notwithstanding the local laws of Kansas may provide for his appointment and require him to file a bond, and prescribe certain duties that he shall perform as guardian, and direct him to account annually or oftener, for the management of the estate of the minor. None of the requirements by the local statutes are in conflict with the general supervision that a court of equity would have over the relationship created by his being appointed guardian.

Many of the States have established local probate courts, which are authorized to not only appoint administrators and issue letters testamentary upon the probate of wills, but are vested with jurisdiction to effect a complete administration of the estates of decedents as fully as that

exercised by the English chancery courts. In some of the States the Legislature has seen fit to declare exclusive jurisdiction in such probate courts, although Kansas has not done so. Questions early arose as to what was the effect of this local State jurisdiction upon the jurisdiction which the Federal courts had derived from the English courts of chancery respecting the administration of decedents' estates. Were non-resident claimants obliged to resort to the local probate court, or could the administration of the estate be conducted in the Federal court? Could the Legislature of a State require a citizen of another State to resort to the probate court of the State for relief, and thereby deprive him of the right to litigate his controversy in the Federal tribunal? There have been many cases decided by the courts bearing upon this interesting question. One of the earliest was the decision of Judge STORY in the case of *Pratt v. Northam*, 5 Mason, 95, which was a bill in chancery brought against the executors of a deceased surety upon an administration bond. The bill alleged that the surety had died leaving a large amount of property, and that the defendants, his executors, had possession of it, and that the same was more than sufficient to pay his debts. The bill prayed for payment out of the personal assets in the hands of the executors. It was urged that a court of equity had not jurisdiction; that the "plaintiff had, if entitled to any, a complete remedy at law on the administration bond ac-

cording to the law of Rhode Island." After expressing doubt whether the remedy at law was adequate, the learned judge said:

"But if it were otherwise, the conclusion to which the objection seems to arrive would not be attained. It has often been decided by the Supreme Court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different States; that it is the same in all States; and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived.

"There are many cases where there exists a concurrent jurisdiction in courts of law and equity. Such are cases of account, of fraud, of partition, of dower, etc. The existence of such legal remedy has never been supposed to oust the jurisdiction of a court of equity. On the contrary, the jurisdiction has been constantly maintained. And *a fortiori*, where the original remedy exists in equity, . . the subsequent assumption of jurisdiction at law ought not to be held to oust that which has already vested. It has been for a great length of time settled that in cases of the administration of assets, courts of equity have a concurrent jurisdiction with courts of law.

"The original ground seems to have been that a creditor or other party in interest had a right to come into chancery for a discovery of assets; and being once rightfully there, he should not be turned over to a suit at law for final redress. And for the purposes of complete justice it became necessary to conduct the whole administration and distribution of the assets under the superintendence of the court of chancery, when it once interfered to grant relief in such cases. . . . The plaintiffs, then, would be here rightfully in court, if for no other purpose, for a discovery of assets in the hands of the executors."

In *Union Bank v. Jolly*, 18 Howard, 503, a bill was filed alleging the recovery in the Federal court of a judgment against administrators, and seeking to enforce its payment. Pending the litigation in the Federal court, the administrators had converted the assets into money and paid all the debts except that of the present complainants, and had still on hand about $6,000. This the administrators refused to apply to the payment of complainants' debts, and were about to distribute to the heirs. The suit was resisted by the defendants upon the ground that the claim of plaintiffs was barred because not presented to the local probate court within the time fixed by the local statute. It was further claimed that—

"If the complainants' demand is not barred by their failure to present it in the probate court, their remedy is at law and not in equity. The defendants admit that they have $6,000 in their hands belonging to the estate of their intestate. If they are bound to pay this to the complainants and refuse to do so, they are guilty of a *devastavit*, and are liable to an action on their bond."

It was further insisted that the local probate court had exclusive jurisdiction in the administration of the assets of deceased, and that citizens of other States were confined in the Federal courts to *establishing* their demands, but the Supreme Court denied the correctness of these contentions, and held that "the law of a State limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State for the recov-

ery of any property or money there to which they may be legally or equitably entitled," and directed that the surplus in the hands of the administrators be applied to the payment of the complainants' judgment.

In *Green's Administratrix v. Creighton*, 23 Howard, 90, a creditor filed a bill against an administrator of a surety on a bond. The bill sought to establish the claim, and to obtain satisfaction from the defendants to the extent of the assets in their hands belonging to that estate, and for that purpose asked a discovery of the assets and an account and payment. Jurisdiction to entertain the bill being denied, the court said:

"The questions presented for inquiry in this suit are, whether the subject of the suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control of it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate without taking a general account of the testator's debts. . . . The question arises, then, whether the fact of the pendency of proceedings in insolvency in the probate court will oust the jurisdiction of the Circuit Court of the United States. In *Suydam v. Broadnax*, 14 Pet. 67, a similar question was presented. A plea in abatement was interposed in the Circuit Court in Alabama, in an action at law against administrators, to the effect that the decedent's estate had been reported as insolvent to a court of probate, and that

jurisdiction over the persons interested and the estate had been taken in that court. This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States. 'It was certainly intended,' says the court, 'to give to suitors having a right to sue in the Circuit Court, remedies coextensive with those rights. These remedies would not be so if any proceedings under an act of a State Legislature to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court.' . . . Thus it will be seen that under the decisions of this court, a foreign creditor may establish his debts in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditor in the distribution of the assets, as provided in the State laws (if any), independently of the administration in the probate courts, cannot be considered until a case shall be presented to this court. The remaining question to be considered is, whether the debt described in the bill entitles the plaintiff to come into a court of equity under the circumstances." . . .

And after deciding that the creditor on an administrator's bond need not, to recover in equity from the surety, first obtain judgment against the principal, (as is the rule at law in Mississippi,) said:

"A discovery of the amount and nature of the assets in hand and their application to the payment of the debt, are required, if they are subject to the application."

And a decree dismissing the bill for want of jurisdiction was reversed.

In *Payne v. Hook*, 7 Wallace, 425, a bill was filed by a distributee against the administrator and his bondsmen for an accounting and to recover her share of the estate. The bill charged gross misconduct on the part of the administrator, and false statements made by him to the local probate court. Final settlement had not been made in the probate court, and proceedings were still pending there at the time the bill was filed in the Federal court. Upon demurrer to the bill, it was claimed that the local probate court had "exclusive jurisdiction over all disputes concerning the duties or accounts of administrators until final settlement," and that resort "was to be had to that court to correct the accounts of the administrator."

The bill seems to be of the same general character as the bill filed in this case, and the same claim is here made, that we should seek our relief in the probate court of Kansas. Justice DAVIS, in rendering the opinion of the court, says:

"The theory of the position is this: That a Federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia.

"If this position could be maintained, an important part of the jurisdiction conferred on the Federal courts by the constitution and laws of Congress would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, of what value would that right be if the court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union. . . . The absence of a complete and adequate remedy at law is the only test of equity jurisprudence, and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings. It is not enough to know that there is a remedy of law: it must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

After commenting upon the remedy at law, the court continued:

"It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond."

And the jurisdiction in equity was sustained.

In *Lawrence v. Nelson*, 143 U. S. 215, the court again asserts:

"The general equity jurisdiction of the Circuit Court of the United States to administer as between citizens of different States the assets of deceased persons within its jurisdiction cannot be defeated or impaired by the laws of the State undertaking to give exclusive jurisdiction to its own courts."

Thus it will be seen that for more than fifty years this court has asserted the equity jurisdiction of the Federal courts to administer the assets of a deceased person, so far as is necessary to secure participation therein by a non-resident claimant, and that such parties are not obliged for this purpose to resort to the local probate courts.

In the recent case of *Byers v. McAuley*, 149 U. S. 608, while the court reversed so much of the decree as attempted to adjudicate the rights of citizens of the same

State as the complainant, it also held that the plea of the pendency of proceeding in the State probate court was not good as against non-resident plaintiff, but that the Federal court had in equity jurisdiction to adjudicate upon their rights, and to that extent directed the entering of a decree in favor of such non-residents for a share in the estate which the court adjudged to them, the amount thereof to be determined by certain rules fixed by the court, and directed that they recover from the administrator such sums thus found to be due. Thus the court awarded such non-residents their shares in the estate, the amount of which could be and was determined by an accounting in the Federal court.

This case, although relied upon by the appellants as sustaining their propositions, is a distinct and very recent decision upon the rights of citizens of other States to resort to the equity jurisdiction of the Federal courts to establish their interests in the estates of decedents, and to have the amount to which they are entitled of such estate, determined in the Federal court, and without being required to resort to administration proceedings pending in the State court.

There is cited in support of the theory of appellants denying jurisdiction to the Federal court, the early case of *Vaughan v. Northrup*, 15 Peters, page 1. It is not difficult to distinguish this case from the line of authorities from which we have quoted. Indeed, considering the

tribunal upon which jurisdiction was sought to be conferred and the tribunal from whence Northrup derived his powers, the case is palpably inapplicable to the contention here. Northrup was appointed by consideration of the Probate or Surrogate Court of Jefferson county, Kentucky, and suit was brought against him in the District of Columbia, touching matters under his control as administrator. In the first place, there is no diversity of citizenship, and it does not come within the rule granting jurisdiction to this court of cases wherein the parties to the controversy are citizens of different States, which controversies might be litigated in the courts of record coördinate with the Federal courts within the State in which the suit was brought. The dicta extracted by appellants' counsel from the opinion is good law with reference to the case in which it was enunciated. It is true that the administrator with reference to the matters of his administration was amenable only to the court in Kentucky which appointed him. But Judge STORY's opinion in this regard does not contravene the proposition that if suit had been brought in the Federal court of Kentucky, and the courts of Kentucky of general equity jurisdiction had coördinate power and authority over matters of administration with the probate court, that the jurisdiction of the Federal court of Kentucky in such behalf would not be upheld.

Neither is the case of *Hagan v. Lucas* an authority in point. It is simply the statement of the converse of the

proposition asserted in the leading case of *Freeman v. Howe*, 24 Howard, 450, and decides only that the jurisdiction of the *res* of property which has got into *custodia legis* by writ of attachment or replevin issued out of a particular court, will not be devised by the compulsory process of another court; or, in other words, that the Federal court will respect the jurisdiction of the State court first acquired in that behalf, so far as its process is concerned, and will enforce respect from the officers of the State court in respect of its own jurisdiction.

We do not contend that the Federal court has the right to assume the administration of an estate to the same extent as a local probate court, but our contention is, and we think the authorities cited sustain the position, that owing to the equitable jurisdiction of the Federal courts, they have the power where diverse citizenship exists (as in this case) to decree against the guardian or trustee an accounting; and upon such accounting occurring, to require the trustee, if the interests of the minor justify it, to turn over to the minor or his representatives such amount found due under the accounting taking place in the Federal court; and in default of complying with the decree, to enter a decree against the guardian and his bondsmen for the amount found due to the estate under such accounting. This is what the bill in this case was framed to accomplish, and this is what the Circuit Court awarded after a hearing upon the merits.

In *Hess v. Reynolds*, 113 U. S. 77, where the question was upon the right to remove to the Federal court a contest arising upon a claim presented to the State probate court, Mr. Justice MILLER said:

"It may be convenient that all debts be paid out of assets of a deceased man's estate, shall be established in the court to which the law of the domicile has confided the general administration of these assets. And the courts of the United States will pay respect to this principle in the execution of the process enforcing their judgment out of these assets so far as the demands of justice require. But neither the principle of convenience nor the statutes of a State can deprive them of jurisdiction to hear and determine a controversy between citizens of different States when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate."

It is true that Congress has not conferred upon Federal courts the appointment of guardians over the estates of minors, and that such power is alone vested in the probate courts of the various States; but when the guardian is thus appointed by the probate court, he instantly becomes a trustee for the minor, and as such trustee is subject to the decree of any Federal court which has jurisdiction to control the administration of trusts and that can acquire jurisdiction of his person.

It is not to be presumed that a Federal judge would award any different decree under the same conditions from that which might be awarded by a State judge. The Fed-

eral court is not to be considered a foreign court in the State where it is being held, nor is the judge presumed to administer different law from that administered by any other court of coördinate jurisdiction. So far, at least, there has not been any conflict between the probate court of Kansas and that of the Federal court in this case. There has never been an accounting before the probate court; nor has there ever been an application made for the transfer of the estate under the provision of the Kansas statute; nor have the complainants ever personally appeared or been brought before the probate court of Ottawa county, Kansas; nor has the probate court ever acquired any jurisdiction over the person of any of the complainants in this case, nor over that of the minor. Consequently, there can be no conflict of jurisdiction within the meaning of the cases relied upon by the appellants. Even if there should in fact occur a conflict of jurisdiction between the Federal and the probate court, there is no help for it except by an amendment to the Federal Constitution; and the inconvenience arising from such a conflict would not necessarily result from the existence of dual jurisdictions, but would arise, if at all, only from the way such jurisdiction was exercised and the laws administered. The complainants have no greater rights in the Federal court than they have under the Kansas laws, and it cannot be denied that under the Kansas statutes the complainants would have a right to apply to the probate court for an account-

ing, and upon such accounting occurring obtain an order for removal of the estate to the domicile of the minor, if it was to the best interest of the minor.

From the foregoing decisions, we contend that the following propositions have been sustained:

First: That the Kansas probate court has not exclusive jurisdiction over the estate of a minor or the person of his guardian, but that the district courts of Kansas as courts of equity, have jurisdiction, and the Federal courts, upon diverse citizenship occurring, have like coördinate equitable jurisdiction.

Second: The English courts of chancery, notwithstanding the jurisdiction of the spiritual courts to administer upon the personal estate of decedents, had jurisdiction, at the suit of a single creditor, to take upon itself the entire administration of estates.

Third: That the Federal courts, in the absence of State statutes, would have the same jurisdiction in this respect as the English courts of chancery, and could, upon the present bill, take jurisdiction of the entire estate of said minor in the hands of said guardian.

Fourth: That this jurisdiction is based upon the principle that guardians are trustees.

Fifth: That State statutes vesting *exclusive* jurisdiction in local probate courts have not destroyed or affected the equitable jurisdiction of the Federal courts over said minor's estate, and that such guardians appointed by the State

court are still trustees amenable to the equity jurisdiction of the Federal courts at the suit of citizens of other States than those in which such guardians are appointed.

Sixth: That non-resident legatees or claimants of another State are not obliged to resort to or submit themselves to the jurisdiction of the State probate court, but are entitled in the assertion and protection of their rights to full and complete relief in the Federal courts.

Seventh: That therefore the right of the legatee or claimant, being a citizen of a different State from that of the guardian, is not merely to establish in the Federal court his claim, but that such claimant is entitled to proceed on the equity side of the Federal court *in personam* against the guardian as trustee to enforce payment in full, and is entitled to an accounting of assets and other debts to determine the amount to which he is entitled, and that he is entitled to this accounting in the Federal court and is not obliged to resort therefor to the local probate court.

If we have established the foregoing propositions to the satisfaction of the court, then it follows that the first three questions certified should be answered in the affirmative, thereby sustaining the jurisdiction of the Federal court.

The fourth question certified, as will be observed, contains two inquiries: First, whether before final settlement the Circuit Court of the United States could inquire into the breaches of the guardian's bond; and second, had it jurisdiction to render a money decree against the guardian

and his bondsmen? Conceding that the Circuit Court has jurisdiction as a court of equity over the guardian, then it will certainly have power to grant full relief to the minor for the maladministration and misconduct of his guardian. Is it to be presumed that the minor or his representative, upon being advised of the maladministration and mismanagement of the guardian, is to stand idly by, witnessing this continuing wasting of the estate until the guardian applies for a discharge and makes a final accounting? It must be that if a Federal court has jurisdiction to grant any relief whatever under the bill, it has full and ample jurisdiction to stop the depletion of the estate, direct an accounting, and call upon the trustee to account for his mismanagement. Without such power, the control over the estate of the minor or over his guardian by a court of equity amounts to nothing. Much stress is laid upon the fact that the guardian annually files his report with the probate court, and the appellants seem to contend that the approval of the probate court is an adjudication which cannot be inquired into, either by the Federal court or by the probate court itself. Such, however, is not the fact. The annual reports required to be made by guardians, and which in this case were made and approved by the probate court, are entirely *ex parte* proceedings. No notice is given of their being filed, or of the time that they will be presented to the court for its action.

In the case of *Musick v. Beebe, Admr.*, 17 Kas. 53, the

Supreme Court of Kansas, in drawing the distinction between the annual settlements and those technically known as final settlements, says:

"But there is a great difference between ordinary annual settlements and what is technically known as a final settlement. The former is simply a statement of the administrator that he has received such amounts and paid out such; and the approval finds that statement to be true. It is therefore in the nature of an adjudication, a judicial determination. But it is, so to speak, only a present adjudication, and *prima facie* correct — one made for the purpose of enabling the court to keep watch of the estate and to control the disposition of its assets, and the payment of its debts. Unquestioned, it is accepted as an adjudication, and made the basis and starting-point of further administration. But it may be challenged without appeal, and in the same court, and without motion for rehearing, or any direct proceedings to set it aside; and any errors or mistakes in it may be corrected at any subsequent settlement. (Gen. Stat. 462, § 158.) These accounts are settled *ex parte*, and without even the pretense of notice by publication or otherwise to any parties interested. But the final settlement of an estate is a more stringent and less easily avoided adjudication. It is more emphatically a judgment. True, it may by the probate court be opened up and the administration continued; but this requires a direct proceeding therefor. While generally *ex parte*, yet it can only be made upon notice. (Gen. Stat. 461, §§ 150, 151; *Winborn v. King*, 35 Miss. 157; *Revis v. Patty*, 43 Miss. 343.) The idea is, that it is that adjudication of the management of the estate to which all interested are directly summoned, and by which all having a day in court are concluded. It is a direct adjudication that the estate is fully administered, and that means either that all the debts are paid, or that all the assets are exhausted. It im-

plies that the administrator has received not merely all the money he admits in his statement, but also no more. In other words, that he has fully accounted for all that he has received, or ought to have received, and that, so far as it was sufficient, he has used it in the discharge of the debts. See upon this question, as pointing out distinctly the difference between an annual and final settlement, *Winborn v. King*, 35 Miss. 157; *Bronson v. Ward*, 3 Paige, 189; and especially *Picot v. Riddles, Admr.*, 35 Mo. 39. This case has a full discussion of the question and a citation and review of the authorities, and its conclusions are in accord with the views herein expressed."

No final settlement or accounting has yet occurred in the probate court between the guardian and the minor. Under the foregoing decision, the minor or his representatives could at any time apply to the probate court to correct the accounts of the guardian, and require him to account for the funds that should be in his hands; and if not accounted for correctly, the guardian could be relieved of his trust and he and his bondsmen held for the amount the estate was damaged by his maladministration. This is an ever-continuing right, that rests in the minor and his representatives until such right ceases by adjudication in the probate court upon the final accounting of the guardian, and after such final accounting the guardian's accounts could then be impeached for fraud. It must be conceded that fraud vitiates everything — final judgments, final orders, final settlements, and contracts; and we think no one will deny that the right would rest with the minor on his attaining his majority to impeach in any court of

equity for fraud the accounts of his guardian, even after the probate court had passed upon and discharged the guardian. The bill in this case charges the grossest fraud upon the part of the guardian with reference to the administration of the estate of the minor. Is he or his representatives required to postpone the assertion of his right to challenge the conduct of the guardian until he, the minor, arrives at his majority? The mere statement of such a proposition, it seems to us, fully answers it. It becomes the duty of the minor or his representatives at once, upon being informed of the maladministration of the estate, to call a court of equity's attention to it, and to prevent by all the means in their power the further wasting of the estate. This duty could be required of them by the guardian's bondsmen, as well as being required of them by all sense of justice and right.

We therefore contend that the mere fact that the guardian has not finally accounted to the probate court cannot be urged to prevent the complainants asserting their rights in this forum; and as we have before asserted, if the complainants have the right to challenge in the probate court the accounts of the guardian at any time before final settlement, then it follows, under the law of the foregoing decisions, owing to their citizenship, that such right is preserved to them, to be asserted in a Federal court having jurisdiction over the persons of the defendants.

It is asserted by appellants that the case at bar comes

within the rule laid down in numerous decisions, that the court first acquiring jurisdiction over the *res* will continue to exercise jurisdiction, and that such jurisdiction cannot be interfered with by the orders or decrees of any other court. We contend, however, that the rule invoked is not applicable to the present case. The United States Circuit Court for the District of Kansas is the first court to acquire jurisdiction over the controversy between the complainants and defendants set up in the bill, and that controversy is for the just accounting of the trust confided to the defendant Morgan and the removal of such estate as may be found to be in his hands to the domicile of the minor. Morgan as trustee is undoubtedly amenable to the orders and decrees of the court that has jurisdiction over his person, and as trustee he can be compelled to do right and justice with reference to the subject of his trusteeship by any court of equity. He has nothing to fear from such a court, and the court would give him the same relief as he would obtain provided the complainants had seen fit to go into the probate court of Kansas and there assert their rights instead of coming into the Federal court and asserting them here. The court of equity, of course, has not the possession of the property of the minor any more than the probate court of Kansas has possession of the property of the minor. The property is in the possession of the guardian, and the guardian cannot be compelled to act except by pressure upon him personally, and

this pressure is brought to bear by entering a money decree against him and his bondsmen if he does not turn over for the benefit of the minor the property or securities that should be in his possession as guardian of the minor.

The learned counsel for appellants assert, in the first paragraph on page 27 of their brief, that "There is no allegation of fraud perpetrated upon the court, or that the approval by the court of the acts of the guardian was secured by any wrongful practices." We cannot understand why such a statement should be made after reading the bill of complaint in this case. All of the alleged breaches of the guardian's bond are based upon charges of fraud perpetrated upon the court. The complainants charge that the inventories filed are false and fraudulent, and point out in what respect they are false. Complainants also charge that the original appointment of the guardian was procured by false and fraudulent statements and by perjury of the guardian.

We have totally misconceived the scope of our bill if it is not based upon allegations of fraud perpetrated by the guardian upon the probate court, both in procuring his appointment and in securing the orders obtained by him as shown by the record.

Again, they assert in the last paragraph of their brief, on page 27: "There can be no breach of the guardian's bond as long as no order of the probate court in respect to the estate is disregarded." We contend, however, that upon

Morgan failing to comply with his duty as guardian, and, to use the language of the bond itself, "faithfully discharge the duties of such guardian according to law," then a liability ensues and a breach occurs, whether Morgan obeyed the orders of the probate court or not. He is charged with the faithful performance of his duties as guardian, and if he does not faithfully administer such trust, then there is breach of the bond and the bondsmen become liable. If the allegations of the bill are taken to be true, then it is apparent that Morgan has not faithfully discharged his duties as guardian, but on the contrary thereof, has knowingly and intentionally disregarded his duties as guardian of the minor and fraudulently and for his own benefit mismanaged and maladministered the estate; and upon his doing so, there at once accrues a breach of the bond.

Now the question is asked, upon such breach occurring has the Federal court jurisdiction to render a money decree against Morgan and his bondsmen? We think that the answer to this question is found in this court's decision in the case of *Payne v. Hook*, above referred to. So much of the decision as bears upon this particular question, is as follows:

"The next objection which we have to consider is, that the sureties of the administrator are not proper parties to this suit. Their liability on the bond in an action at law is not denied, but it is insisted they cannot be sued in equity. If this doctrine were to prevail, a court of chan-

cery, in the exercise of its power to compel an administrator to account for the property of his intestate, would be unable to do complete justice, for if, on settlement of the accounts, a balance should be found due the estate, the parties in interest, in case the administrator should fail to pay, would be turned over to a court of law, to renew the litigation with his sureties. A court of equity does not act in that way. It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them. Having power to determine the liability of the administrator for his misconduct, it necessarily has an equal power, in order to meet the possible exigency of the administrator's inability to satisfy the decree, to settle the amount which the sureties on the bond, in that event, would have to pay.

"Besides, it is for the interest of the sureties that they should be joined in the suit with their principal, as it enables them to see that the accounts are correctly settled and the administrator's liability fixed on a proper basis. If they were not made parties, considering the nature and extent of their obligations, they would have just cause of complaint.

"It is said that the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained, will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlements with the probate court as fraudulent, and to cancel the receipt and transfer from the complainants to the administrator, because obtained by false representations; but the determination of these questions is necessary to arrive at the proper value

of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds which the administrator might commit to its prejudice."

We know of no decisions of this court modifying the decision above quoted, but on the contrary, many courts have sustained the same doctrine.

In the case of *Green, Admr., v. Creighton et al.*, 23 Howard (U. S), page 108, this court, in commenting upon the right of a court of equity to enforce obligations under an administrator's bond, says:

"It is well settled that no one can proceed against the sureties on an administration bond at law who has not recovered a judgment against the administrator. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered, and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. (*Moore v. Walter's Heirs*, 1 Marsh. R. 488; *Moore v. Armstrong*, 9 Porter, 697; *Carew v. Mowatt*, 2d ed. Ch. R. 57.)"

After these decisions, it seems to us that it is hardly a question of doubt but that a court of equity has power to enter a decree against the principal and sureties upon a guardian's bond where investigating his trusteeship.

An affirmative answer to the fourth question propounded by the Court of Appeals simply gives a court of equity

full power to adjudicate the rights of the parties when they are before them; nothing more, nothing less.

There are some other questions discussed by appellant's counsel in their brief, but being outside of the questions certified, we do not feel called upon to reply to them except briefly.

The personal capacity of complainant Potter is not plead in any way, and even if any existed, it cannot be taken advantage of except by preliminary plea. While the question of jurisdiction can be raised at any stage of the proceeding, we think it is clear that every personal incapacity of the complainant must be taken advantage of by preliminary plea. This rule is clearly established in the case of *Livingstone v. Story*, 11 Peter, 393, wherein the court says:

"It now remains for us to dispose of the defendant's protest in the beginning of his answer against the jurisdiction of the court in this case. The twenty-third rule of this court for the regulation of equity practice in the Circuit Courts has been relied on to show that it is competent for the defendant, instead of filing a formal demurrer or plea, to insist on any special matter in his answer and have the same benefit thereof as if he had pleaded the same matter or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability or personal character of the parties suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery, in which matters in abatement and to the jurisdiction, being preliminary in